

LEADING
AMERICAN RAILWAY CASES,

ON

MOST OF THE IMPORTANT QUESTIONS INVOLVED IN THE LAW
OF RAILWAYS, ARRANGED ACCORDING TO SUBJECTS.

WITH NOTES AND OPINIONS

BY

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BEING A SUPPLEMENT TO THE AUTHOR'S WORK ON RAILWAYS.

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P R E F A C E.

THE author has endeavored to supply a need which has been felt to a considerable extent by the profession, throughout the country, and especially in the rural districts, remote from extensive Law Libraries, by publishing the Leading American Cases and Opinions upon most of the topics discussed in the Law of Railways, arranged according to subjects. He has also ventured to include some carefully prepared opinions of his own, both while connected with the courts and since. He has also given, in many cases, extended notes, which he trusts will not be without their use in aiding the profession to learn the present state of the law upon the points discussed.

In most cases the head-notes have been made anew and much abbreviated, and the statements of the facts either wholly omitted or reduced to the smallest proportions consistent with a proper understanding of the cases. The opinions are given at length in the words of the judges, except where they discuss points not connected with the law of railways. It is not expected to supersede or abridge the use of the Reports, but only to furnish a convenient and reliable secondary means of supplying the defect, where those are not accessible. By this mode of condensation it

has been practicable to give a very large number of very important opinions. The author feels some confidence in hoping that the volume will be found scarcely less useful than the two former ones on the Law of Railways.

The volume will be found convenient and useful to those who may have access to the Reports, by bringing the Leading Opinions upon different topics connected with the Law of Railways into compact form and moderate space ; and will be almost indispensable to those who have not convenient access to the Reports.

I. F. R.

Boston, December 20, 1869.

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3. An apportionment of stock to one not entitled to hold it is inoperative as to himself, but he will hold in trust for the party entitled.
4. The party claiming to have suffered injury must join, in his bill for redress, all parties liable to be affected by the redistribution he claims. The commissioners do not represent them.

5. The bill should pray a preliminary injunction where that is desired. But if the party consents to receive back the money required to be deposited on subscriptions, he thereby abandons his claim to become a subscriber.
6. Where the commissioners have a discretion to distribute the stock as they deem most for the interest of the corporation, they are not obliged to give some to each subscriber.
7. They may, in such case, give it all to one or more; but if they are required to distribute it among the subscribers with no discretion, they must do it according to the number of shares subscribed by each.
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3. By comity in the American states, corporations created in one state may sue in the courts of other states; and their contracts, wherever made, are recognized as valid. And the same rules of law are recognized between states entirely foreign to each other.

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two-thirds. And any existing company may accept the provisions of the General Act by filing with the Secretary of State a certificate of such acceptance.

2. Where the board of directors, without filing any such certificate, proceeded to make arrangements for aiding in the construction of other lines, and to guarantee bonds and stock of such companies for that purpose, and after having done so resolved to submit their action to a meeting of the stockholders for ratification, and called such meeting without giving notice of the business to be submitted, and a majority of the stock was not represented at the meeting, and a majority of the stock which was represented did not vote on the question of ratification, but the bonds and stock so guaranteed went into the market and continued to be bought and sold there for two years, when this bill was brought by a share-holder of the company to restrain them from paying the interest upon such bonds, it was held : —
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3. In the absence of all provision, in charter, by-laws, or statute, for calling meetings, every member entitled to notice.
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3. Per *Comstock, J.*, if the expulsion were illegal, company not responsible, but only the agent. (*Sed quere.*)
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2. By the laws of New Hampshire the corporation in that state must keep a record of the transfers by its own officers resident in the state.
3. There must be an entry of the transfer upon the stock record, or it must be sent to the office for that purpose. But where the old certificates were surrendered and new ones issued by a transfer agent appointed for that purpose in another state, and the new certificates forwarded by mail to the home office of the company for registration, it will be sufficient, although an attachment be made before the actual registration.
4. Where there was a delay of nearly a month, it was held fatal to the title of the pledgee.
5. The rule of damages against corporations for improper refusal to admit the trans-

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 2. Nor that a previous subscriber had been induced to sign by similar assurances, but had in fact paid his subscription.
- II. Note referring to *C. & P. R. Railw. v. Bailey*, 24 Vt. 465; *P. & K. Railw. v. Dunn*, 36 Me. 501; and *Mann v. Pentz*, 2 Sandf. Ch. 257. p. 158.

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Hartford & N. H. Railway v. Kennedy, 12 Conn. Reports, 499.

1. A subscription to the stock of a corporation, implies a promise to pay such instalments as shall be assessed on such shares.
2. A power in the charter to sell the shares of delinquents is a cumulative remedy, and does not affect the right of action on the subscription.
3. The rule in criminal procedure that the statutory remedy to recover penalties is exclusive of all others, does not here apply.

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I. — *Everhart v. The West Chester & Philadelphia Railway*, 28 Penn. St. Reports, 339.

1. Modifications of the charter of a corporation, useful to the public, and beneficial to the company, and in furtherance of the purposes of the incorporation, do not avoid existing subscriptions.
2. The addition of a new enterprise will have that effect.
3. But the grant of power to issue preferred stock for the purpose of equipping the road, will not have that effect.
4. All subscriptions to the stock of corporations are based upon the implication that the company may use the ordinary means to accomplish the object of the incorporation.
5. An assignment of the stock to escape responsibility will not have that effect.

II. — *The Philadelphia & West Chester Railway v. Hickman*, id. 318. p. 184.

1. A condition that a subscription to stock shall not be binding until after a given amount is subscribed and certain instalments paid, is valid.
2. Where a full discretion is reposed by the charter in the directors and managers of

the company, both as to the time and mode of payment of subscriptions, they may accept payment in the payment of debts owing by the company, or in land damages, or in labor and material for construction.

3. The corporation has an implied power to make all contracts reasonably necessary to carry into effect the purpose of its incorporation.
4. It also possesses the implied power to compromise disputes.

III. — *Piscataqua Ferry Company v. Jones*, 39 New Hampshire Reports, 491. p. 187.

1. The subscriber for stock is liable for the payment and assessments on the same before the stock is sold, under a by-law for the payment of the amount due upon it.
2. All parol representations or agreements made at the time of subscription at variance with the terms of subscription, are inadmissible in defence of an action on the subscription.
3. A by-law requiring ten dollars to be paid at the time of subscription under the penalty of avoiding the subscription is for the benefit of the company, and may be waived by them.

IV. Note referring to *Vicksburg, Sh., & T. Railw. v. McKean*, 12 La. An. 638; *North Carolina Railw. v. Leach*, 4 Jones, Law, 340; *Black River & Utica Railw. v. Clarke*, 25 N. Y. 210, and many other cases. p. 195.

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I. — *Hartford & N. H. Railway v. Croswell*, 5 Hill's Reports, 383.

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I. — *Vermont Central Railway v. Clages*, 21 Vermont Reports, 30.

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 2. While the corporation is in process of organization it is sufficiently *in esse* to become the payee of such a note.
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I. — *Babcock v. Western Railway*, 9 Metcalf's Reports, 553.

1. The grant by the owner of land of the right to build a railway, confers the same title to the use of the land as if condemned for that use.

2. Such grant gives an implied right to so build sluices and culverts in the adjoining lands of the grantor as to render the railway and the adjoining land reasonably safe from the effects of water in streams running near.
- II. Note referring to *New Jersey Central Railw. v. Hetfield*, 5 Dutcher, 206, 571; *Branson v. The City of Philadelphia*, 47 Penn. St. 329. p. 211.

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Western Railway v. Babcock, 6 Metcalf's Reports, 346.

1. It is a good defence to a bill for specific performance, that the defendant, without gross negligence on his part, fall into a misapprehension as to the effect of the contract, or that it will operate as a hard, unequal, and oppressive bargain, or that it will operate differently from what the parties expected. But the burden of proof is on the defendant.
2. Where a party agrees with a railway company to convey to them the right to construct their road in either one of two routes across his land, he cannot defeat a bill for specific performance by showing that, either from his own views, or the opinions of others or the representations of the corporation or its agents, he expected it would have selected a different route from the one in fact selected.
3. Where the owner of land agrees to allow a railway corporation to build their road over his land, and to convey the land to the company after the road is built, he cannot defeat such a bill by showing the company did not expressly bind itself to take the land, and delayed to bring the bill for three years after taking possession of the land.
4. Where a deed to a corporation is delivered to its agent authorized to negotiate the purchase, that is a delivery to the corporation, and the acceptance of such an agent is the acceptance of the corporation.
5. Inadequacy of consideration to be a defence to such a bill, should be so gross as to afford a reasonable presumption of fraud or mistake.
6. Where the party in such case had refused to convey the land and obtained an assessment of land damages, he is liable to pay the difference between the damages assessed and paid by the company, and that for which he agreed to convey the land.

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Beekman v. Saratoga & Schenectady Railway Co., 3 Paige's Reports, 45.

1. The right of eminent domain is a prerogative right remaining in the sovereignty to resume the use or title of land for any public necessity or convenience, such as the construction of a road, canal, or other public improvement.
2. One restriction upon the exercise of this right is that it shall not be done without just compensation in the mode prescribed by law.
3. It rests solely in the discretion of the legislature whether to exercise the right or not, in a particular case.

RIGHT OF ENTRY FOR PRELIMINARY SURVEYS AND OTHER
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I. — *Bloodgood v. The Mohawk & Hudson Railway Company*, 18 Wendell's Reports, 9.

1. The legislature have the right to take private property for the construction of a railway, on making just compensation, whether the same be constructed by the agents of the state, or by a corporation or joint-stock company created for that purpose.
2. But this right should never be exercised except where the public good imperiously demands it, and there is provided a clear and certain remedy for the owner of the land to obtain adequate compensation.
3. Where the charter of the company contained a proviso that lands so taken should be purchased by the company or the damages assessed by commissioners, this forms a condition precedent to the right of entry.

II. — *Cushman v. Smith*, 34 Maine Reports, 247. p. 233.

1. The clause in constitutions which prohibits the taking of private property for public use was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or an easement in it.
2. It was designed to operate, and it does operate, to prevent the acquisition of any title to land, or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it.
3. That the right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it.
4. That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation or a tender of it be made within a reasonable time after the commencement of such occupation.
5. That under such circumstances an action of trespass, or an action on the case, may be maintained to recover damages for all the injuries occasioned by the prior occupation.

III. Note referring to *Parsons v. Howe*, 41 Me. 220; *Vermont Central Railway v. Baxter*, 22 Vermont, 370, and many other cases. p. 245.

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I. — *Stacey v. Vermont Central Railw.*, 27 Vermont Reports, 39.

1. A railway company does not acquire any title to land condemned for their use, by the survey and record of the location, or by the appraisal of the land and the record of the award of the commissioners.
2. The payment or deposit of the price is a condition precedent to any right of entry upon the land.

3. The owner of the land acquires no vested right to the damages until the company acquire title to the land.

II. Note referring to *Neal v. Pittsburgh & Connellsville Railw. Company*, 31 Penn. St. 19, where a somewhat different view is taken. p. 252.

TITLE REQUIRED BY COMPANY AND RIGHT TO EXCLUDE FORMER OWNER FROM ALL USE OR POSSESSION. p. 253.

I. — *Hill v. Western Vermont Railway*, 32 Vermont Reports, 68.

1. A party by entering into an agreement to convey land to a railway company, is only bound to convey so much and such an estate therein, as the company require for their purposes.
2. The company have no power to take compulsorily any more land or any greater estate therein, than is necessary for their uses.
3. That estate is only an easement or right of way, and is not subject to levy upon execution.
4. By the charter of the company, they were the judges of the extent of land required for depot accommodations, and their decision made in good faith was final

II. Note giving the point decided in other cases in different states. p. 259.

CORPORATE FRANCHISES MAY BE TAKEN FOR PUBLIC USE. p. 260.

West River Bridge Company v. Dix, 6 Howard's (U. S.) Reports, 507.

A bridge, erected by a corporation, having the exclusive privilege of erecting and maintaining the same and taking tolls for passing it, while so used may be taken and converted into a public highway under a general law of the state, compensation being made therefor, the same as for other property put to public use.

RULES FOR ESTIMATING LAND DAMAGES. p. 282.

I. — *Meacham v. Fitchburg Railway*, 4 Cushing's Reports, 291.

1. Benefits to the remaining portion of the land, but not to other lands of the same owner, may be set off against the price of the land taken.
2. The time at which the appraisal is to be made is when the land is appropriated to public use, and no reference can be had to facts occurring subsequently.

II. — Note referring to *Hornstein v. Atlantic & Great Western Railway*, 51 Penn. St. 90; *Giesy v. C. W. & Y. Railway*, 4 Ohio, n. s. 308. p. 284.

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I. — *Dodge v. County Commissioners*, 3 Metcalf's Reports, 380.

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II. — Note referring to *Sabin v. Vermont Central Railway*, 25 Vermont, 363, and giving the substance of the opinion. p. 287.

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I. — *Hatch v. Vermont Central Railway*, and *Whitcomb v. Same*, 25 Vermont Reports, 49.

1. Railway companies are not responsible for necessary consequential damages accruing to premises not taken by them, by the prudent construction and operation of their roads.
2. But they are responsible for diverting a stream of water to the injury of neighboring proprietors.

II. — Note referring to other cases on this subject. p. 304.

RIGHT TO OCCUPY THE HIGHWAY BY EXPRESS OR NECESSARILY IMPLIED PERMISSION OF LEGISLATIVE GRANT. p. 305.

Springfield v. Connecticut River Railway, 4 Cushing's Reports, 63.

1. The legislature may grant to a railway the right to lay their track longitudinally along the highway.
2. But the intention of the legislature to appropriate land already in public use, to another purpose, must be evidenced by express words or necessary implication.
3. *It seems*, that a town, in its corporate capacity, has sufficient interest in such a question to maintain a bill in equity in regard to it.

EQUITABLE RELIEF FROM THE DECISION OF THE ENGINEERS UNDER CONTRACT FOR RAILWAY CONSTRUCTION. p. 310.

Herrick v. Bellnap's Estate and the Vermont Central Railway, 27 Vermont Reports, 673.

1. A stipulation in a contract for construction, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," makes his decision final.
2. This will bind the company to employ for engineers competent and trustworthy persons, and to see that they perform such service at the proper time and in the proper manner.
3. Such contract will not require the estimates to be made by the chief engineer. It may be done by his assistants.
4. The payment will depend upon the engineer's estimates, and if the company are not in fault, they will not be bound to pay till the estimates are made.
5. But if the estimates fail to be made, without the fault of the contractor, he may recover at law even.
6. The estimates by which payments are to be made import final and not merely approximate ones.
7. A court of equity will have jurisdiction to try a claim for damages caused by under-estimates through mistake or fraud.
8. The company would not be liable on such a claim in favor of a subcontractor, unless it connived at or in some way contributed to the under-estimate.
9. But if that were the fact on the part of the company or its agents, although done

to obtain more time for payment and not with any view ultimately to defraud the contractors, it will be liable.

10. The plaintiff claimed a certain amount as under-estimated. The masters reported more than twice that amount of under-estimates. Held there could be no recovery beyond the amount claimed.
11. The master's report should state the points made by counsel and the facts found upon each point.
12. Testimony *viva voce* before the master must be returned to the court.
13. The master must also state the account at length, and all the facts found by him, so that the report will be intelligible, without reference to the testimony.

THE RIGHT TO RECOVER, ON A QUANTUM MERUIT, FOR WORK DONE UPON A RAILWAY, BUT NOT STRICTLY IN COMPLIANCE WITH ALL THE TERMS OF THE SPECIAL CONTRACT. p. 328.

Merrill v. Ithaca & Owego Railway, 16 Wendell's Reports, 586.

1. Where the work is continued beyond the time limited in the contract, with the consent of all parties, the contractor may recover for the work, upon the common counts, but only at the price agreed in the contract.
2. But where the company is the party in fault in protracting the time for completing the work, the contractor may recover, as upon *quantum meruit*.
3. Mere check-rolls, not verified by the oath of the agent who kept them, are not competent evidence.
4. If the agent be dead, his entries in the due course of his business will be evidence, but not where he is merely out of the reach of process.
5. But any party who saw the entries made and knew them to be correct at the time, may verify them, although having no present recollection of the facts.
6. Services to become a proper subject of proof as a book charge upon the oath of the party, must have been such at the time of their performance.
7. The question of proof by original entries and memoranda considered and cases cited.

RESPONSIBILITY FOR FIRES COMMUNICATED BY THE COMPANY'S ENGINES. p. 341.

Burroughs v. Housatonic Railway, 15 Conn. Reports, 124.

When the plaintiff's buildings standing near the company's road were fired by sparks from the company's engines, without negligence on its part, he cannot recover.

INJURIES TO DOMESTIC ANIMALS.—FENCES, AND THE DUTY OF RAILWAYS IN REGARD TO THEM. p. 347.

I.—*Railway Company v. Skinner*, 19 Penn. St. Rep. 298.

1. Railways, aside from statutory requirements, are not bound to fence their roads, or run their engines with any view to the possibility of cattle coming upon the track.
2. Every man is bound to keep his cattle off the track, and if he do not and in con-

sequence suffer damage he has no remedy, but is liable for all damage thereby accruing to others.

- II. — Note embracing the case of *Jackson v. Rutland and Burlington Railway*, 25 Vt. 150, and the opinion of the Court. p. 351.

RESPONSIBILITY OF RAILWAY COMPANIES FOR THE ACTS OF CONTRACTORS AND THEIR AGENTS. p. 356.

I. — *Hilliard v. Richardson*, 3 Gray's Reports, 349.

Where the defendant employed another, at a fixed price, to alter a building into a dwelling-house and find the materials, it was held that he was not liable for injuries happening from such materials being left on the side of the highway by a servant of the contractor.

- II. — Note referring to *Linton v. Smith*, 8 Gray, 147. *Blackwell v. Wiswall*, 24 Barb. 355, and other cases. p. 371.

LIABILITY OF THE COMPANY FOR THE ACT OF ITS SERVANTS AND EMPLOYEES, WHILE IN THE COURSE OF THEIR EMPLOYMENT, WHETHER THE ACT BE WILFUL OR NEGLIGENT, AND WHETHER ACCORDING TO OR IN VIOLATION OF SPECIAL INSTRUCTIONS. p. 375.

1. — *Lowell v. Boston & Lowell Railway*, 23 Pickering's Reports, 24.

1. Where the company had power to construct their road across the highway, and in doing so had so far broken it up as to render it dangerous; and had placed barriers to prevent travellers going upon it in the night-time, which the servants of the company omitted to keep up, whereby a traveller suffered injury and recovered double damage of the town, it was held the company were responsible.
2. And although the omission occurred through the negligence of the servants of the contractor they were here held responsible, the work being done by the direction of the company, although at a stipulated price. *Quere.*
3. The town having been compelled to pay damages to the party injured may recover of the company, but only single damages, and not for the costs and expenses of the action, it not appearing that it was defended at its request or for its benefit.

- II. — Note referring to *State v. Vermont Central Railway*, 27 Vt. 103, and many other cases. p. 382.

INJURIES BY NEGLIGENCE OF FELLOW-SERVANTS OR DEFECTIVE MACHINERY. p. 384.

I. — *Farwell v. Boston & Worcester Railway*, 4 Metcalf's Reports, 49.

1. Where the master exercises due caution and skill in the selection of his servants and supplies them with suitable machinery, he is not responsible for an injury by neglect of fellow-servants to each other in the same employment.
2. Facts of the case stated. Company not held responsible.

- II. — Note referring to *Warner v. Erie Railway*, 39 N. Y. 468, s. c. 8 Am. Law Reg. 209. p. 391.

POINTS DECIDED, p. 392.

1. A railway company is responsible to its employees for the safety of its road and equipment and for the selection of suitable fellow-servants in the several departments of its work. And if any of its employees suffer injury from any defect of duty in these respects, it is liable.
2. But where there is no defect of duty on the part of the company, either in construction or in inspection and repair, and any of its structures prove to be insufficient, and servants suffer damage in consequence, the company is not responsible. The board of directors, as representing the company, do not assume the responsibility of warranting either the sufficiency of the works or the competency of the employees. Actual or presumptive knowledge of some deficiencies in these respects must be brought home to them.
3. Where under such circumstances a bridge fell while the plaintiff was passing over it upon a train, it was *held*, in the absence of notice of the insufficiency, that it was error to leave the question of negligence to the jury.

POWER OF CORPORATIONS LIMITED BY CHARTER. DIRECTORS HAVE SAME POWER AS CORPORATION, UNLESS RESTRICTED IN CHARTER OR BY-LAWS. p. 401.

- I. — *Pearce v. Madison and Indiana Railway*, 21 Howard's (U. S.) Reports, 441.

1. Two distinct railway companies meeting at one point have no power to consolidate their capital and business.
2. Nor to purchase a steamboat line to run in connection with the railways.
3. And promissory notes given for the price of such a purchase cannot be enforced.

- II. — Note referring to *Rutland and Burlington Railway v. Proctor*, 29 Vt. 93, containing the substance of the opinion of the court. p. 404.

CORPORATE TRUSTS.—DUTY OF RAILWAY DIRECTORS AND OTHER OFFICERS. p. 405.

Sturges v. Knapp & Troy & Boston Railway, 31 Vermont Reports, 1.

1. The trustee in a railway mortgage holds an active and fiduciary trust, and not a mere dry or naked one.
2. This duty continues after the foreclosure of the mortgage the same as before, until the legal discharge of the trustees.
3. The trustees are not excused in following the advice and direction of the majority of the bondholders.
4. Having no equipment for the road, they must elect between hiring one and leaving their road with the best lights in their power.
5. A stipulation on the part of the lessee to repair should be construed to extend to the whole term, and to rebuild all structures decayed beyond use, or destroyed in the mean time.
6. A lease for ten years, with the right to determine at the end of one year, upon notice, is not unreasonable.
7. The effect of a notice served by the majority of the bondholders need not be considered until the time for giving notice has expired.

8. If the road leased has authority from the state to lease to a connecting road at the line of the state, no question can be raised as to any want of authority in the road accepting the lease under the laws of its own state. That will be presumed so long as neither the stockholders or the state interfere.
9. The lessors could not avoid the lease on the ground of informality merely, short of want of power to execute it, showing it *ultra vires*.

DICTA.

1. All trusts depend very much upon constructions and implications growing out of the surrounding facts.
2. That is especially true of such transactions as that now under consideration.
3. All corporate action, as well as that of the directors and agents of the company, is but a succession of trusts.
4. Trustees cannot be removed from a part of the trust, leaving other parts still in force. The trust must be either ended or transferred, before any discharge of the trustees.

THE POWERS AND DUTIES OF THE RESPECTIVE COMPANIES,
WHERE THE LINE OF ONE COMPANY IS OPERATED BY ANOTHER.

Bissell v. Michigan Southern & Northern Indiana Railway, 22 New York Reports, 258.

Where two railway companies, chartered and in operation under the laws of different states, united with another company in still another state and built its road and the lines of all the companies were operated jointly, it was held the three companies were jointly responsible for injury to a passenger upon any portion of the line, through the negligence of the employees. p. 421.

DICTA.

1. *Comstock*, Ch. J., here denies that in all cases the contracts and dealings of railway corporations, not within the terms of the charter, are to be held absolutely void.
2. The same contracts *ultra vires* may be void, but not illegal, in the ordinary sense of those terms as applied to contracts.
3. By *Selden*, J., contracts, *ultra vires*, may be enforced in favor of parties ignorant of the want of authority, but not in favor of parties conscious of that defect, *sed quare*.
4. The doctrine, *ultra vires*, discussed, and its limitations defined by *Comstock*, Ch. J., and *Selden* J.
5. Remedies of share-holders for abuse of corporate powers, *Comstock*, Ch. J.

THE WRIT OF MANDAMUS. GENERAL RULES OF LAW GOVERNING
THE SAME. CERTIORARI. p. 463.

I. — *Strong, Petitioner*, 20 Pickering's Reports, 494.

1. Where the petitioner was duly elected county commissioner and the examiners refused to give him a certificate, and ordered a new election, at which another person was chosen; it was held mandamus would lie to compel the examiners to give him a certificate, notwithstanding he might have to resort to a *quo warranto* to displace the present incumbent.
2. The general nature and extent of the writ discussed.

- II. — Note on the proper office and practice upon writs of certiorari and mandamus, in the nature of a *procedendo*, referring to several cases on the subject, and quoting from opinions of *Bigelow*, C. J., in *Mendon v. County Commissioners of Worcester*, 2 Allen, 463, and *Redfield*, C. J., in *Woodstock v. Gallup*, 28 Vt. 587. p. 467.

DEGREE OF CARE REQUIRED IN REGARD TO THE APPARATUS BY WHICH PASSENGERS ARE CONVEYED. p. 471.

I. — *Ingalls v. Bills, et als*, 9 Metcalf's Reports, 1.

1. Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.
 2. A passenger in a coach received an injury solely by reason of the breaking of one of the iron axle-trees in which there was a very small flaw, entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received.
 3. If a passenger in a coach by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat.
- II. — Note on the general question, including opinions in full of the court, in *Alden v. New York Cent. Railw. Co.*, 26 N. Y. 102; *McPadden v. Same*, 47 Barb. 247; and *Readhead v. The Midland Railw. Co.*, 17 Weekly Reporter, 737. p. 481.

ON THE CONSTITUTIONAL RIGHT OF THE STATES TO TAX SHARES OF DOMESTIC CORPORATIONS HELD BY NON-RESIDENTS.

- I. — The requirements of the statute of 1854 involve great inequality and injustice, as matter of taxation. In principle it must involve, if legal, the right of destroying the stock of non-residents, at the will of the legislature. For if the principle is legal, it may be extended, till it absorb the entire income of the stock. Hence some have attempted to *imply*, in every grant of a charter of incorporation, an *exemption* from taxation. But this is no more to be *inferred*, from such a grant, than from the grant of any other property, real or personal. p. 498.
1. Corporations taxable for property, income, and faculty.
 2. The capital stock or property of corporations clearly taxable to them.
 3. Mr. Justice *Wayne's* exposition of the subject.
 4. Three species of property taxable to the corporation: 1st. Capital stock; 2d. Property; 3d. Franchise. Shares taxable only to the owners.
- II. — If, then, the corporation is taxable for its capital stock, why may it not be taxed for the portion represented by shares owned by non-residents? p. 500.
1. It is certain this could not be done, as to a portion of the capital represented by the shares of the resident owners.
 2. Taxation implies an equalization upon the same class of property throughout the district taxed.
 3. It is, therefore, not competent to tax property of the same class at different rates, in different portions of the district taxed.

III. — But it may be urged that this rule does not extend to non-residents. p. 501.

1. As to real estate, a different mode of appraisal, on account of the non-residence of the owner, will not render the tax void.
2. But non-resident citizens and aliens do not stand upon equal footing, as to taxation.

IV. — The United States Constitution secures to non-resident citizens of any of the United States the right of equal taxation with the citizens resident within the state where the tax is levied. p. 502.

1. The article in the old Confederation, compared with that in the present Constitution, upon this subject.
2. This article has always been regarded as having reference to acquiring and holding property in the several states by the citizens of other states.
3. This view was early adopted when the subject was fresh in the minds of all, and while the framers of the Constitution were upon the bench and at the bar.
4. Two decisions of the Maryland Court of Appeals stated, wherein it is held to have chief reference to taxation.
5. The opinion of Mr. Justice *Washington* stated, wherein he held similar views.
6. Cases cited from the Court of Appeals in Virginia and Kentucky, holding similar views.
7. A case from Alabama, expressly deciding the very point, within the last few years, stated.
8. The course of the decision is uniform in that direction, and there is nothing to oppose it.

V. — This indemnity against unequal taxation, extends not only to the amount, but to the principle or the mode, of its levy. p. 505.

1. The security, in regard to taxation, being reasonable in degree, depends much upon its affecting all alike; and this security is more important to non-residents than to residents.
2. This applies with great force to the different corporate interests, both as to the corporation and the corporators.
3. Shares are only taxable to the owner, in the place of his domicile.
4. And it is not material where the corporation is located.
5. The shares have no *situs* except the domicile of the owner.
6. The title to the shares and to the capital stock entirely distinct.
7. The only subject, in regard to which the shares and the capital stock are regarded as identical, is that of *exemption from taxation*.
8. But this does not prove that both may not be taxed at once.
9. Double taxation, illegal, but taxing shares and capital stock, is not.
10. The corporation is taxable, at the place of its principal office, for its franchise and all its property, except real estate.
11. The injustice, or abuse, of taxation, in detail, will not render it void, but its vicious principle will.
12. The fact that the corporation is taxed for all its property and its franchise has no tendency to exempt its shares from taxation.
13. The objection, in principle, to a tax of this kind is, that it is a special imposition upon a limited class of property, easily destroyed.

VI. — *Résumé* of points established. p. 511.

1. That a non-resident cannot be taxed upon shares.
2. The United States Constitution secures equality of taxation to non-residents, both in amount and in principle.
3. This tax is, in reality, upon the shares of a non-resident, but, in form, against

the corporation, upon an aliquot proportion of its stock, represented by the shares of non-residents.

4. Illustrations of the entire inadmissibility of this mode of taxation.
5. And it is no excuse, that, in consequence of the non-residence of the owners, no other mode is practicable.
6. It is, in substance a levy of a tax, on account of choses in action, upon the debtor, because the creditor does not reside where any such levy can be made upon him.

VII. — Conclusion. The tax is void for many reasons. p. 514.

1. It is far more than the shares of residents are taxed for state tax.
2. Views of Angell and Ames upon the point.
3. It is not a tenancy in common, and if it were, it would be illegal to tax the share of one tenant higher than those of the others.
4. Such a right of taxation, subversive of liberty.

VIII. — There can be no question in regard to relief in the Circuit Court of the United States. p. 515.

POWER OF THE LEGISLATURE TO MODIFY THE CHARTER OF TRINITY CHURCH, NEW YORK.

1. The real question involved in the whole case, is settled by the act of 1814.
- I. — Was Trinity Church, in 1814, a private corporation? p. 518.
1. This question has been evaded, by calling the property of Trinity Church a trust. But the same question arises in regard to a trust, as in regard to a corporation, whether it is public or private.
 2. Eleemosynary corporations, colleges, academies, and churches are private.
 3. Distinctions between public and private schools.
 - 4, 5, 6, 7. Law of the Dartmouth College case stated.
 8. Analogy between that case and this stated; and other similar cases referred to, and the analogy between college and academic corporations and churches stated.
 9. Definition of a public college or university.
 10. Definition of a private college or university.
- II. — Trinity Church being a private eleemosynary corporation, it did not become subject to legislative control, because the principal fund arose from a royal grant. p. 522.
1. Public grants to private corporations have always been common.
 2. They impose no different duties from private grants.
 3. Public colleges and academies may exist.
 4. Parish churches in England, public corporations, but the parish system never transplanted into the colonies.
 5. Conclusion, that Trinity Church is in all respects a private corporation.
- III. — Charter viewed as a contract. p. 524.
1. Every amendment is also a contract, when accepted.
 2. Cases upon the subject reviewed.
- IV. How far such charters are subject to repeal, alteration, or amendment, by the legislature. p. 525.
- 1, 2. The authority and application of the case of Dartmouth College v. Woodward stated.
 3. Other cases in the United States Supreme Court stated.
 4. The law of the cases in the State Courts discussed.

5. Case of *Louisville v. The University*.
- 6, 7, 8, 9. The law and the evidence concur in one result, that the state legislature have no control over this corporation, and never exercised or claimed any such control.
- V.—Is the proposed alteration of the charter a violation of the corporate rights? p. 529.
 1. No franchise of a private corporation more vital than that of self-government.
 2. No security to the corporation that the legislature will not do injustice.
 3. No justification for doing injustice to Trinity Church, that some great good is proposed to be thereby effected.
 4. Or that the funds might be more wisely managed.
 5. Or that the petitioners act in good faith.
 6. It is easy for men to commit the most flagrant outrages upon private right, in most perfect good faith.
 7. These illustrations may seem not likely to occur, but from the past we know not what to expect.
 8. It may be said a void law can do but little injury.
 - 1, 2, 3, 4. But it does much, in many ways.
- VI.—Questions incidental to the main inquiry. p. 533.
 - I. 1, 2, 3, 4, 5. The relations and duties of the corporation, and of the *cestuis que trust*, in reference to their rights and duties discussed.
 - II. But if all that is claimed in regard to the facts is conceded, the act of 1814 did not impair any vested right.
- III. Non-parishioners never had the right to vote in the elections in Trinity Church.
- IV. Extent of the visitatorial power.

RAILWAY INVESTMENTS. — POWER TO MORTGAGE, AND MODE OF EXECUTION.

Knapp and Miller v. Rutland and Washington Railway.

- I.—As between debtor and creditor these questions would be of entirely different consideration. p. 558.
 - II.—But all *bona fide* creditors stand upon equal equity; and a prior right among creditors must rest upon some legal advantage, fairly gained. p. 558.
 - III.—In this view the defects in the plaintiff's legal claim are numerous, and of a very marked character. p. 558.
- It professes to be a mortgage of the real estate and franchises of the corporation without any action of that body, but through the agency of the directors merely. This cannot be maintained in law.
1. Because the title resides in the corporation alone, and can be conveyed only by the corporate action, in conformity with its charter and by-laws, and the general laws of the state.
 2. All corporate franchises, and especially those of railways, are strictly personal and inalienable.
 3. This is a question of capacity and power in the corporation to make the deed, and may be raised by any one having an interest in it.
 4. Such an act, being *ultra vires*, is not susceptible of confirmation by any subsequent acquiescence of the corporation, either express or implied, or by any general act of the legislature.
- IV.—Creditors are only affected by the registry of a valid mortgage, or knowledge of its existence. p. 561.

1. The fact of an entry in the books of the company, that the bonds were delivered at a time subsequent to the statute, is not proof of the fact, and if the fact were proved, it could not affect subsequent *bona fide* encumbrancers, since it does not appear upon the registry.
 2. An instrument deficient in the statute requirements not entitled to registry, and not, therefore, constructive notice.
- V. — There was not only a defect of power in the corporation to execute the deed; but there is an entire want of any proper *action* of the corporation. p. 562.
1. It is not done in the name of the corporation, and does not therefore profess to be their act.
 2. There is no pretence of any action of the corporation, but only of the directors, which is as absolutely incompetent as if it were the act of a single stockholder or director.
 3. The expression "all the business of the company," does not enlarge the ordinary powers of directors. It is not the proper business of a corporation to assign all their franchises, or even all their property. That would be to *annihilate* and not to "*transact* their business."
 4. Directors of joint-stock companies have no such power, as has often been decided.
- VI. — This attempt to convey the real estate of the corporation by a vote of the directors is in direct conflict with express provisions of the general statutes. p. 564.
1. It has been expressly decided that the general provisions of the statute as to the *mode* of conveying real estate are exclusive.
 2. So also that the vote of the corporation is indispensable to create the power to do so.
- VII. — The addition to the name of Merritt Clark of "President," and of the name of the corporation, is a mere *descriptio personæ*; and would not render the deed binding upon the corporation, even if Clark had authority to bind them. p. 565.
- VIII. — The effect of the seal of the corporation being attached to the first mortgage. p. 566.
1. It is attached to the paper in such a place, at the very top, as not to indicate it was done as an act of execution.
 2. Sealing never held equivalent to signing.
 3. The proof shows that the seal was attached after the execution of the instrument.
 4. If it is regarded as any portion of the instrument, it will avoid it, as a material alteration.
- PART II. Notice in fact may be relied upon by the plaintiffs. p. 567.
- IX. — There is no evidence of notice in fact, except by Miller and Baldwin. These cannot avail against the bondholders under the second mortgage. p. 567.
1. These bonds are negotiable instruments, and pass an absolute title by delivery.
 2. The notice to Baldwin was not valid for any species of contract. It was more calculated to put him off inquiry than no notice at all.
 3. The fact that Miller had been trustee in a former mortgage, if a valid one, could be no notice to the *cestuis que trust* under the second mortgage, even if the securities were not negotiable. 1. He was a mere agent. 2. All the notice to him was acquired in a different transaction. 3. The fact that he retained \$250,000 of the bonds *secured* by this mortgage for the benefit of the first bondholders, not *secured* at all, showed that *he* even was not attempting to gain any fraudulent advantage.
 4. But notice to all the trustees will not aid the plaintiffs.

- X. — The claim to have the contract reformed, and for specific performance and a foreclosure, is not maintainable. p. 569.
1. Because of the intervening rights of other *bona fide* encumbrancers.
 2. This will be to *supply* a power, instead of *aiding* a defective execution of one.
 3. The lapse of time and acquiescence of plaintiffs is an invincible obstacle to such a decree.
 4. There is no such notice in fact to the subsequent encumbrancers, or even to Miller and Baldwin, as to justify a court of equity in interfering in any way.
- XI. — Some reliance is made upon the fact of having obtained the indorsement of good counsel. p. 571.
1. This cannot render an invalid instrument operative in law.
 2. The *omission* to obtain proper advice may operate against a party.
 3. The advice was rash if it was given.
 4. This may not fairly justify any inference of bad faith in the bondholders, but it shows very clearly that those who executed the mortgage were *not* solicitous to have it valid, provided it did not bind them personally.
- XII. — The position of affairs called for despatch and some reserve. p. 572.
1. Because the stockholders had subscribed under an assurance that *no* mortgage would be given.
 2. The fact that the mention of any such mortgage has been studiously kept out of the written reports to the stockholders, shows reserve in fact.
 3. The fact that the officers volunteered to get up this first mortgage, for the benefit of the contractors merely, is reason enough for reserve as to stockholders.
 4. All the circumstances go to show that it was regarded as a temporary expedient by the officers of the company.
 - 5 and 6. If the officers of the company or the bondholders believed in the validity of this contract, it was attributable exclusively to their *studious reserve* in regard to seeking *thorough counsel*, which is scarcely less than gross negligence if we can fairly believe that it occurred altogether in good faith.
- XIII. — Under such a lame show of equity on the part of the plaintiffs, it would be going farther than any case has ever gone to postpone the claim of those who appear throughout the transaction, in all their connection with it, to have acted in the utmost good faith. p. 574.

RIGHT OF COMMONWEALTH OF MASSACHUSETTS TO TAKE POSSESSION OF THE TROY AND GREENFIELD RAILWAY.

- I. — Possession of commonwealth valid. Foreclosure in ten years after the road is finished and in operation will result from the surrender. p. 579.
1. This will not affect the interest under the Smith mortgage. That can only be foreclosed in a court of equity.
 2. The term of redemption extended to the company will give the same term to intermediate encumbrancers.
- II. — The title of commonwealth unquestionable to the extent of \$2,000,000. p. 582.
1. Ordinarily, mortgages for future advances only create lien as advances are made.
 2. Here the commonwealth was bound to make the advances, and the encumbrance was absolute to that extent in the first instance.
 3. The Smith mortgage being made in terms subject to that of the commonwealth, to the extent of \$2,000,000, they can make no objection to that mortgage, or to the right to advance \$2,000,000 under it.

4. And the subsequent mortgages are an effectual confirmation of the title of the commonwealth on the part of the company.

III. — The matter stated more in detail. p. 583.

1. The statute giving the power to mortgage the franchise to the commonwealth, any change of location, and all after-acquired property pass, both as incidents of the main thing and by the terms of the statute.
2. The rule of law against executing a valid mortgage of future acquisitions has no application where the statute confers such a power.
3. It has been made a question how far the alteration or repeal of the act of 1854 may have postponed the mortgage of the commonwealth.
4. The alterations seem to have been made at the instance of the company and the contractors, and for their relief, and will not therefore prejudice their rights.
5. But no subsequent mortgagee can insist upon the rights of a strict surety, and that the terms of the first mortgage shall remain.
6. He is not a surety for the debt secured by the prior mortgage, and cannot complain of any change in the securities, if the amount is not increased.
7. The form of the bond and mortgage is valid under general statutes.
8. It is expressly required, in that form, by the act of 1854.

IV. — The subsequent mortgages to the commonwealth convenient, but not indispensable. p. 586.

V. — The questions arising on the Smith mortgage are such that it is impossible to give reliable advice in regard to them all. p. 587.

1. It is important to inquire whether the bonds are valid or negotiable instruments.
2. Statute requires them to be payable in twenty years, and not to exceed capital paid in.
3. This requirement is of binding obligation upon the company, in issuing these negotiable securities.
4. Railways may probably, without special authority for the purpose, execute negotiable instruments, such as bills of exchange and promissory notes.
5. But, the thing here provided for is the addition of funded capital, to the amount of the previous stock capital.
6. A limitation was therefore placed upon this power of making funded capital.
 - (1.) Should only be done for funding floating debt, and borrowing money for purposes authorized by law.
 - (2.) The funded capital thus created should not exceed stock capital in money.
 - (3.) The securities should not extend beyond twenty years, or bear interest over six per cent, or be in sums less than \$100.
7. The powers of the company are thus clearly defined, and contain an implied denial of the power of raising funded capital in any other mode. The bonds are therefore *ultra vires*, and void, as to the company.
8. They are of no more force in the hands of *bona fide* purchasers. So held in England.
9. The defect of authority is apparent upon the face of the instruments, and he who takes the security of a corporation must look to its powers.
10. The bonds therefore void in the hands of every one.

VI. — It may be claimed that the mortgage should be upheld as a security for the debt of the contractors, without regard to the bonds. p. 592.

1. The general rule is that the mortgage is security for the debt.
2. Contracts *ultra vires* are simply void, not illegal.

3. Courts not expected to extend the rule to this transaction.
 4. Mortgage must probably perish with the bonds.
 5. But if the mortgage should be upheld independently of the bonds, it will be merely for the benefit of the contractors.
 6. English case favoring this construction.
 7. Mortgage then solely under control of contractors.
 8. Requisite in this view to inquire into the power of railway companies to execute valid mortgages, without express legislative sanction.
 9. English rule, and probably true one, that no such power exists.
 10. But legislative sanction may be implied, or given after the deed.
 11. And without this, a company having the power to take tolls, may create such a lien upon its property as to give a lien upon its tolls in equity, to be enforced through receiver.
 12. This was the general opinion certainly at the date of this mortgage. More recently the tide sets somewhat against it.
 13. At date of this mortgage, was probably some reason to say that the legislation of this state did make the franchise of taking tolls by railway companies alienable for the security or payment of debts.
 - (1.) The statute allowing the franchise of any corporation for taking toll to be attached on mesne process, and sold on execution, certainly treats this species of property as alienable for security or payment of debts.
 - (2.) But the provisions of the general statutes as to railway mortgages still more strongly imply the general power to mortgage the franchise of taking tolls.
 - (3.) These provisions can only be made reasonable by being treated as limitations upon the general right of such corporations.
 - (4.) General course, to leave restrictions upon special acts, to those acts.
 - (5.) Probable that the general course of legislation in this state had made the roads, equipments, and franchises of railway companies alienable by these companies for the security of debts.
 14. But if the courts should hold the mortgage operative only upon the personal property, and that part of the road-bed and superstructure owned by the company at the date of the deed : —
 15. This would give the second mortgagees the right to redeem the first mortgage, and the commonwealth might be bound to treat it as a subsisting encumbrance, unless it is void upon the grounds above stated.
- VII. — Brief statement of legal force of other liens. p. 598.
1. Attachment of iron, as property of Haupt & Co., not valid.
 2. Grounds of this opinion explained.
 3. But statute of 1862 may include this claim upon the iron.
 4. But only to extent of appropriation, and upon full relinquishment.
 5. Claim of Connecticut River Railway for freight of the iron comes within equity of statute of 1862, and probably should be paid to same extent as other claims. But the carrier's lien has probably been waived.
 6. Difficult to say how far provisions of statute of 1863 apply. Probably intended to apply.
- VIII. — 1. The second mortgagees, if their mortgage is valid, may redeem the first mortgage at any time before the foreclosure of their rights. p. 601.
2. The consent of the contractors to the surrender of the road to the commonwealth would postpone any claim on their part, till after the whole sum necessary to be advanced in completing and equipping the road, whether beyond \$2,000,000, or less.

3. Contractors bound by terms of their consent to same extent as company by surrender. Smith mortgage thus postponed to all claims on part of commonwealth, to full extent of furnishing and equipping the road.
- IX. — Validity of Mr. Bartlett's attachment dependent upon whether the franchise of a railway company for taking tolls is assignable or alienable for the benefit of creditors. p. 602.
- X. — Smith mortgage and Bartlett attachment possible clouds upon title of commonwealth. Desirable to obtain opinion of Supreme Judicial Court in regard to their validity. p. 603.
 1. Court would not probably regard this case as proper to be referred to them by executive or legislative department of the government.
 2. But specific provisions of constitution on the subject reach this case, unless it is to be excepted on special grounds.
 3. The importance of having these adversary rights determined will recommend the matter to the most favorable consideration of the court.
 - 4, 5. Application to the court in equity recommended.
 6. Subsequent encumbrancers should be notified before expenditures made by the commonwealth beyond the \$2,000,000.
 7. Permanent erections made by mortgagee in possession, not ordinarily valid charge.
 8. Should the commonwealth go forward and finish the road and put it in operation, and equity allow other parties to redeem, they would probably be required to repay all such expenditures.
 9. But one case of railway mortgage foreclosure in this state.

STREET RAILWAYS. p. 606.

The Broadway Railway Company v. The Metropolitan Railway Company.

1. Question of jurisdiction of the subject-matter of controversy.
2. The right of way, where different companies run upon the same track.
3. The mode of estimating compensation, where one street railway company use the track of another company.

REPORT OF THE COMMISSIONERS ON STREET RAILWAYS, TO THE
LEGISLATURE OF MASSACHUSETTS. p. 618.

The subjects of the commission discussed in detail.

1. Until perfection is reached, the exact relations of the municipalities and street railways cannot be strictly defined. Scope is required for development and growth.
2. We do not regard the interests of towns and cities as opposed to that of street railways.
3. Caution required to be used in regard to concessions of public right.
4. Reserve in regard to concessions to private interests of great magnitude and success, excusable. This may be done, in excess. Primary control of streets, and ultimate control, if practicable, should remain with municipalities.
5. Relations of street railways to each other, and to the use of streets by other vehicles, &c.
 - (1.) Rule of compensation where one road uses the track of another, without doing any competing business.
 - (2.) The best mode of accommodating other travel to street railways.

- (3.) The gauge of street railways and other carriages, should be the same.
- (4.) Paving street and three feet on each side, fully indemnifies the cities and towns, in ordinary cases.
- (5.) Railways should not be allowed in street, unless room for two tracks, and for carriages to stand, and others pass on either side.
- (6.) Street railways should be restricted within these reasonable limits, in laying new tracks. Improvements suggested in Boston.
6. Further discussion of the use of tracks by different companies.
 - (1.) Branch lines should account for the net profits of all business done by them exclusively upon the trunk line.
 - (2.) To exclude the branch line from the trunk might put it too much in the power of the latter.
 - (3.) Not practicable to require trunk roads to draw the cars of branch lines over their own road, in all cases.
 - (4.) The rights of trunk and branch lines, upon sound principles of construction.
 - (5.) The mode of estimating compensation in such cases, recommended by us, will cure the desire to multiply trips.
7. The relations of street railways to other travel, further discussed.
8. The propriety of consolidating street railways in Boston, discussed and doubted.
9. Omnibuses cannot, properly, be excluded from streets where street cars are allowed.
10. The subject of removing ice and snow from the streets discussed.
11. The motive power of street railways. Dummy engines.
 - (1.) The examination of these engines. Their use not fully tested.
 - (2.) They will be exceedingly useful in rural and suburban districts.
 - (3.) They occupy but small space, ascend steep grades with ease, and possess great power.
 - (4.) They will be likely to come into general use in light and short passenger traffic, both on steam and street railways.
12. Commutation tickets. Best regulated by the companies. Change recommended.

The State of Maryland v. The Baltimore and Ohio Railroad Company.
The Baltimore and Ohio Railw. Company v. The State of Maryland. p. 636.

Distinction between Passengers and Strangers. — Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers, than to mere strangers having no fiduciary relations with the company.

Distinction further defined. — In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

Negligence of Plaintiff. — The plaintiff cannot recover for an injury resulting from the negligence of the defendant, if notwithstanding such negligence, he might have avoided the injury by the exercise of care and prudence on his part, or if his own want of such care and prudence, or that of the party injured, in any way contributed directly to the injury.

Damages. — In a case where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.

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LAW OF RAILWAYS.

LEADING CASES, OPINIONS, AND NOTES.

RECOVERY OF CORPORATION FOR SERVICES RENDERED IN PROCURING CHARTER.

I. — *Low v. Connecticut and Passumpsic Rivers Railway*, 45 N. H. 375.

Where services are rendered for the benefit of a corporation, in obtaining subscriptions, and removing obstacles to its going into operation, which are valuable, and rendered at the request of one or more of the corporators, or of those who were connected with them, and the corporation, after its organization, accepted of such services, and received their benefits and advantages, the person rendering them is entitled to recover compensation therefor of the company. And the party may have redress in an action of assumpsit, upon the implied promise resulting from the facts.

But the contract must be governed by the law of the State where the corporation is created and operates.

Some very pertinent illustrations of the refinements to which the courts in this State have to resort in defining the testimony competent to show the value of property, since the opinion of witnesses is not here received.

OPINION OF THE COURT.

BELLOWS, J. The great question is whether the plaintiff is entitled to recover of the corporation in any form for services rendered by him antecedent to its organization, but which were necessary to enable it to complete that organization; and if so, whether the action of assumpsit can be maintained.

In considering the first question, it will be assumed, for the present, that the services were necessary; that they were rendered at the request of one or more of the original corporators, or of those who were associated with them; and that the corporation accepted those services after its organization, and enjoyed the benefit of

them. Under such circumstances, we are inclined to the opinion that it would become the duty of the corporation to pay for such services ; and that, in some form, this duty could be enforced.

Questions of a similar character have repeatedly arisen in England, where the projectors or promoters of railway enterprises, who were about to solicit acts of incorporation, had agreed with the proprietors of land over which such railways were destined to pass, and who were prepared to oppose such acts of incorporation, to pay certain sums of money for the land to be taken, and for residential damages, in consideration that they should withdraw their opposition. In such cases where opposition was so withdrawn, and the charters obtained, and the companies organized, it has been repeatedly held that a duty was imposed upon the corporation to perform the contract of the projectors, upon the principle, it would seem, that a corporation is in equity bound by the contracts of its projectors preliminary to its incorporation, when it afterwards takes the benefit of such contract. In *Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Railw. Co.*, 7 Eng. L. & Eq. 124, the Vice-Chancellor lays down the doctrine thus: "Where the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterwards, then if the body for whom the projectors assumed to act, does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform."

This was a case where the projectors agreed to pay the complainant £5,000 for the land to be taken for the railway, and residential damages, and the plaintiff therefore assented that his land should so be taken. This agreement was in writing between the plaintiff and the executive directors of the Lancashire & North Yorkshire Railway Company, which was afterwards united with another and rival enterprise, under the name of the defendant corporation, and the two companies agreed to adopt the contract with the plaintiff. Upon a bill in equity, the court held that the plaintiff was entitled to relief against the defendants, although the construction of the contract was referred to a court of law for an opinion.

The same general doctrine is recognized in *Gooday v. Colchester & Stour Valley Railw. Co.*, 15 Eng. L. & Eq. 596 ; so is *Edwards v. Grand Junction Railw.* 1 Mylne & Cr. 650 ; and *Stanley v.*

Chester & Birkenhead Railw. Co., 9 Simons, 264 ; affirmed by the Chancellor in 3 Mylne & Cr. 793. These cases are all suits in equity, and the doctrine of these is recognized in Redfield on Railways, 638, § 5 ; and some of them quoted and considered in § 7, p. 641, *et seq.*

In the application of this doctrine to cases of agreements to pay money in consideration of withdrawing opposition to a charter, there might be serious objections, as suggested by Judge Redfield, in § 15 of his work on Railways, as being contrary to public policy ; but in respect to agreements not open to such objections, — that is, agreements that would bind parties in existence, and capable of contracting, — we think the principle is sound and well sustained by authority. If, then, this be a sound principle in respect to agreements made before the corporate existence commenced, it must surely apply with increased force to agreements made after the charter, and before the organization, of the corporation.

Indeed, in the American courts, agreements made with corporations after their charter, but before organization, such as agreements to take and pay for shares in the capital stock, have been repeatedly enforced, and even by suits at law. Such are the cases of Chester Glass Co. *v.* Dewey, 16 Mass. 94, and Salem Mill-dam Co. *v.* Ropes, 6 Pick. 23, where subscribers for stock before organization were held liable for assessments to pay preliminary expenses incurred in obtaining the act of incorporation, and ascertaining the practicability of the enterprise ; but not for the general objects of the corporation until all the shares were subscribed for. So is Kennebec & Portland Railw. Co. *v.* Palmer, 34 Maine, 365 ; and Penobscot Railw. Co. *v.* Dummer, 40 Maine, 172. The same principle is recognized in Phillips Limerick Academy *v.* Davis, 11 Mass. 116, and Wallindford Manufacturing Co. *v.* Fox, 12 Vt. 304 ; Greaves *v.* Turnpike Co., 1 Sneed (Tenn.), 491 ; Lake Ontario Railw. Co. *v.* Mason, 16 N. Y. (2 Smith) 451 ; Tonica, &c. Railw. Co. *v.* McNeeley, 21 Ill. 71 ; Vermont Central Railw. Co. *v.* Claves, 21 Vt. 30 ; Angell & Ames on Cor. 495, and cases cited.

These cases go upon the ground that where such subscriber is received and acts as a member of the corporation, after the organization, and as the owner of the shares agreed to be taken, he is liable on his subscription, though made before the organization was effected ; for, having taken the benefit of his subscription, he must

also take the burden along with it. This, as it will be seen, is simply the converse of the doctrine which binds the corporation by a contract made by the projectors, and of which the corporation afterwards takes the benefit. In a large proportion of cases, the subscriptions for stock necessarily precede the organization of the corporation and the choice of officers, but, upon the subscribers being received and acting as members, they would be bound by such subscriptions.

The question, then, arises, whether a suit at law can be maintained to recover of the corporation the value of these services. As before observed, the English cases referred to are bills in equity, and the reasoning of the courts tends to exclude the idea of suits at law. See, especially, *Edwards v. Grand Junction Railway*, 1 Mylne & Cr. 650. Where, however, the charter provided that the cost of obtaining it should be paid out of the first sums subscribed, it was held that debt would lie against the corporation by an attorney, who had solicited and obtained the charter, to recover for the costs, charges, and expenses. *Tilson et al. v. Warwick Gas-Light Co.*, 4 B. & C. 962. See Chitty on Con. 250, and cases cited.

In the case above cited, one count of the declaration was special, setting out the statute, and there were other counts for work and labor, and the court were inclined to hold that a recovery might be had on either count. In *Hall v. Vt. & Mass Railw. Co.*, 28 Vt. 401, it was decided that a suit at law against a corporation would lie to recover for the services of the plaintiff in attending various meetings of the corporation after the charter, and before the organization, he having been one of the original corporators under the charter, by which subscriptions for five thousand shares were necessary before an organization could be perfected. The court held that the duty rested upon the corporators to do whatever was required by the charter to effect that result; that, although the corporation might not be vested with full corporate powers, yet it was *in esse*, and had an inchoate existence, and the corporators had the power, and were so far the agents of the corporation as to bind them by any act which they were required to do, or which was necessary to perfect their organization under the charter; and the court held, that, under the circumstances, a promise to pay was implied. That was an action of book debt, and is an express authority, that, in Vermont, a suit at law may be maintained; and

it will be observed that in the case before us the corporation was chartered by the legislature of that state, and the road there located and built.

Under these circumstances, we think that the contract must be regarded as made in Vermont, and there to be executed ; and therefore, in its nature, validity, and interpretation, to be governed by the laws of Vermont ; while, in respect to the form of the remedy, it is to be governed by our own laws. *Dyer v. Hunt et al.*, 5 N. H. 401 ; *Stevens v. Norris*, 30 N. H. 466 ; 2 Kent's Com. 462.

It may then safely be assumed, that, under the laws of Vermont, the corporation is liable in some form for services necessary to perfect its organization, and which, when such organization was perfected, it accepted and enjoyed the benefits arising therefrom. Such would be the case in respect to services in obtaining subscriptions to the capital stock, rendered by a corporator or associate, and which subscriptions were after the organization accepted by the corporation. Of course, to entitle the plaintiff to recover, such services must have been necessary and reasonable, and rendered not gratuitously, but with the understanding and expectation that they were to be paid for.

The question, then, is whether an action at law can be sustained in New Hampshire to enforce such claim ; or whether resort can be had to equity alone. The objection to a recovery in a suit at law is purely technical, but it must, nevertheless, prevail if it be well founded. We are inclined to think, however, that it is no violation of settled principles to hold that a suit at law may be maintained to enforce the obligation to pay for services rendered in the manner described, and of which the corporation, after its full organization, has taken the benefit. If it were true, that, at the time the services were rendered, the corporation had no capacity to make a contract, — which is by no means clear after the charter has been accepted, — still, if the services were rendered for the corporation upon the promise of the corporators that they should be paid for by it when its organization was perfected, and after that the corporation had adopted the contract and received its benefits, we think, that, upon the maxim that a subsequent ratification is equivalent to a prior request, it may well be held that a promise to pay will be implied. Upon this principle, a person may sue on a contract made in his name by one assuming to have au-

thority, but having none in fact. So the title of an administrator will relate back to the death of the intestate, so as to entitle him to sue for the price of goods sold by one assuming to act for the administrator, whoever might be afterwards appointed, — Broom's Legal Maxims (676), and cases cited, — and still at the time of such sale there was no one in existence having capacity to make a contract as administrator. See also *Foster v. Bates*, 12 M. & W. 226. So, if one without authority buy goods for another, but afterwards the other receives them, this is equivalent to a previous request. 1 Wms. Saund. 264, n. 1; Broom's Legal Maxims, (596); Story on Agency, §§ 244, 250; *Keyser v. School District*, 35 N. H. 481, 482.

In such cases, it can avail nothing, by way of defence, to show that in fact the party had no capacity to make such antecedent request, or to bind himself by a contract, as, in the case of a corporation, that it was not organized at all, or imperfectly, — any more than to show that, in point of fact, there was no such request or no contract made. But the promise is implied by law from the fact that the party, when it *had* capacity to contract, has taken its benefits, and therefore must be deemed to have taken its burdens at the same time; and he is estopped to controvert it, either by showing a want of capacity to make a contract, or that none in fact was made. Upon the same principle, a person entering into a contract with a corporation in their corporate name is estopped to deny that it is duly constituted. *Dutchess Cotton M. Co. v. Davis*, 14 Johns. 238; *Congregational Society v. Perry*, 6 N. H. 164; *Angell & Ames on Cor.* 594. The case of an infant is in point. He has not capacity to bind himself by a contract, except for necessities; but if, after he arrives at full age, he apply the goods to his use, he is bound to pay as he had promised. So here, if the corporation, after its organization, has elected to receive the benefit of services rendered for it prior to such organization, the law may well imply a promise to make reasonable compensation for them. To bind the corporation, however, by such ratification, it would be essential that it had previous knowledge or notice of the existence of such claim, or of the material facts upon which it is founded; or, at least, that it was put upon inquiry in respect to it. 2 Greenl. Ev. § 66, and cases; *Bell v. Cunningham*, 3 Pet. 81; *Wilson v. School District*, 32 N. H. 128.

The case before us stands much upon the same ground as a

promise to the corporation, before it is organized, to take and pay for shares in its capital stock which may, when adopted after organization, be enforced by suit at law. Upon these principles, the instructions to the jury, that if a corporator perform necessary labor, and expend money in carrying out the provisions of the charter and to effect an organization, and this is assented to by the corporation, or, being known to them, is not objected to, and the corporation is organized, and enjoys the benefit of such services, the law implies a promise to pay for them, are, as we think, substantially correct. Indeed, it would be immaterial whether such services were rendered by a corporator or another, because the subsequent ratification is equivalent to an antecedent request; but we think that without such ratification, either express or implied from taking the benefit of such services, the law would raise no such promise to pay from the mere fact that the plaintiff was requested to render them by one of the original corporators as associates.

The grantees named in the charter are the sole members of the corporation until associates are admitted by them; and they may, at a meeting duly called and holden, accept the charter and choose directors and other corporate officers. They may, indeed, proceed to discharge the duties devolved upon the corporation by its charter without the admission of any associates. *Hughes v. Parker et al.*, 19 N. H. 181; *Day et al. v. Stetson*, 8 Greenl. 365; *Penobscot Boom Co. v. Lamson*, 16 Maine, 224. It is obvious, then, that to bind the corporation by an acceptance of the charter, or other act, the concurrence of at least a majority of the grantees or members is necessary. This is the general rule applicable to corporations aggregate both before and after associates are admitted. *Angell & Ames on Cor.* 3d ed. 459, §§ 67, 70; 2 *Kent's Com.* §§ 277, 324; *St. Mary's Church in Philadelphia*, 7 S. & R., Penn. 517; *Rex v. Dr. Askew*, 4 Burr. 2199; *Rex v. Amery*, 1 T. R. 588. It follows then, of course, that no single member or grantee has power to bind the corporation, either before or after a full organization is effected, unless he is in some way duly authorized to act as its agent by a majority of the members. The duty to take the necessary steps to organize the corporation rests, not upon individual members, but on the body of the grantees, which in its corporate capacity has the sole power to determine what measures, and by what agents, it shall be effected. To hold each individual grantee to be an agent of the corporation for this purpose, and, of

himself alone, empowered to bind it, would not only lead to inextricable confusion, but it is directly contrary to the well established principles which govern the action of corporations.

In the case of *Hall v. Vt. & Mass. Railway*, before cited, there are expressions in the opinion of the court capable of a construction contrary to the views we have here expressed ; but, taken in connection with the fact of there being evidence of assent by the body of the grantees to the rendering of the services, and the corporation having the benefit of them, we think the court could not have intended to hold that a promise could be implied to pay for services by one of the grantees, rendered without the assent of the others, or a majority of them, unless afterwards ratified by the corporation. And such, as we understand it, was the view of the judge who tried the cause before us, although, in one clause of the instructions, the condition that the corporation should have taken the benefit of the services is not repeated.

In addition to the grounds already mentioned, upon which a suit at law may be sustained, it will be observed, that, by section fourth of the charter of the defendant railway, the expenses of all surveys and examinations, "as also of the preliminary surveys already made and making, and all manner of incidental expenses relating thereto, shall be paid by said corporation." So far, then, as the services rendered by the plaintiff come within this provision, the case of *Tilson et al. v. Warwick Gas-Light Co.*, 4 B. & C. 962, before cited, is an authority in favor of his right to recover.

There are several other questions arising upon the prayer for instructions, but, as the verdict is to be set aside upon other grounds, the views already expressed make it unnecessary now to consider them.

We shall proceed now to examine the questions in relation to the admission of evidence ; and first, as to the correspondence with Boston and Canada gentlemen. As bearing upon the extent of the plaintiff's labors, this correspondence was admissible as tending to show that he had procured from these persons some assurances of favor to the enterprise ; and it might also bear legitimately upon the question of knowledge in the stockholders (if that became material) of the services rendered by the plaintiff. It being, then, admissible for these purposes, it is unnecessary to inquire, in the present aspects of the case, as to its bearing upon other questions ; it being presumed, in the absence of exceptions, that proper instructions were given.

To the proof offered of the plaintiff's capacity for such business, we can see no objection ; for upon that, to some extent at least, the value of those services must depend. It is, indeed, nothing more than the ordinary case of showing that a party is an experienced workman, that the value of his services may be the better estimated. To show, then, that he was accustomed to conduct successfully a large business requiring qualities needed for the business in question, would be likely to aid the jury in estimating the value of his services.

The evidence that the plaintiff labored in Boston until the subscriptions amounted to nearly \$300,000, and that he himself obtained subscriptions in one day to the amount of \$5,800, might in one aspect of the case be admissible, and in another it would not be. If the fact of such subscriptions to stock were in controversy, then the books should be produced or accounted for, as being the primary evidence on that point, and the fact could not be proved in this indirect manner. If, however, in the absence of controversy as to the fact of such subscription, the evidence was offered to show that the plaintiff himself solicited and obtained them, as might fairly be understood from the case, we think the evidence was admissible. Indeed, this proof could be made in no other way, as the books would not naturally show by whom the subscriptions were obtained.

We think, also, that it was competent for him to prove that his labors in Boston were interrupted by illness, which caused him to return home, and desist from business for a few days ; as this fact would necessarily occasion the expense of another journey to Boston, which it would be proper for the jury to consider.

The opinion of the president, that the plaintiff ought to be paid for his services if any one was paid, we are inclined to think was not admissible. It is not a promise of one authorized to bind the corporation, nor an admission of one authorized to speak for it, — at least no such authority appears, — and, for aught we can see, it stands as the opinion merely of an officer of the corporation. See *Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205.

Another question is as to the opinion of the witness touching the value of a horse in question, it appearing that he had bought and sold many horses, and knew the prices at which they were sold in that vicinity. Under these circumstances, he was allowed to testify that the best class of horses — none, however, equal to the one

in question — were selling there for \$200 to \$250. If this be regarded as a statement of sales of horses within the knowledge of the witness, it might perhaps be admissible as tending to show the market price, and the question would then arise in what manner should the quality of such horses be shown: whether by describing them, by stating that they were of the first quality or class, or comparing them with the horse in question. It is obvious that the last two methods have been adopted here, and the witness has been allowed to state that those horses were of the first class or quality, but not so good as the one in question. This is clearly, we think, a matter of opinion, founded upon a comparison of the various qualities of those horses, such as size, spirit, strength, speed, bottom, age, color, beauty, soundness, temper, and training, for both harness and saddle, with horses in general, and with the horse in question in particular; and from the description of which the jury would be very competent to form an opinion for themselves; and it is in no sense like the question of the sea-worthiness of a ship, or other matter of skill or science. It is, in short, but another mode of giving an opinion as to value, by stating that such horses, or rather inferior ones, were selling in market at a certain price, instead of stating directly what his market value was; but we think the same objection lies in both cases; namely, that the opinion of the witness is given, instead of the facts from which the jury are to form an opinion.

It may be urged that the statement of the qualities of the horse, as size, weight, speed, &c., is matter of opinion also, and if it were so its admissibility would be an exception to the general rule which excludes opinions. The truth is, there are and must be received, as evidence, many statements which depend upon estimates or opinion as to size, weight, distance, speed, identity, sound, and the like. But these are received of necessity, otherwise it would often happen that no testimony could be had; and, besides, it is received not as a mere opinion, but as a statement of size, weight, distance, identity, &c., measured or ascertained by the eye which is trained to such exercises. In respect to identity, no other evidence could ordinarily be had. In regard to weight and distance, more accurate evidence might be obtained by measuring or weighing, and still something must ordinarily be left to opinion or judgment in the process; as, for instance, the length of the measure, whether a two-foot rule or a yardstick, the accuracy of the weigh-

ing machine, &c. It is obvious, then, that testimony of this sort is of the nature of a statement of fact, although there is mingled with it, necessarily, matter of opinion or judgment; but it is broadly distinguishable from the statement of opinion as to value, which is determined by a consideration of the various qualities of the article in question, and which may be described to a jury, whose province it is to form an opinion for themselves. That there can be no necessity for receiving such opinions, is obvious, from the fact that all the materials for forming an opinion for themselves would be laid before the jury, whether the opinion of witnesses were to be received or not, and, judging from ordinary experience, the mere opinion of the witnesses would afford to the jury but little aid.

These general views are fully sustained by the case of *Leighton v. Sargent*, 31 N. H. 119, in an able opinion by Judge Woods. That was a case of malpractice against a physician, and the defendant proposed to inquire of a physician, who was well acquainted with defendant's qualifications, whether in his opinion the defendant possessed more than the ordinary skill of members of the profession; but the inquiry was rejected, and, on exceptions, the ruling was fully sustained. The judgment of the court was, that opinions are admissible only from men of science, art, or skill in some particular branch of business, but are not admissible as to matters with which a jury may be supposed to be equally well acquainted; and the court say, that, from the facts upon which the witness in that case founds his opinion, the jury can judge as well as he, such opinion not being the result of scientific knowledge, and the court held that opinions of witnesses are only admitted in evidence from necessity, and are exceptions to the general rule.

In that case, the opinion of a physician, an expert in his profession, was sought as to the comparative skill of the defendant as a surgeon; in the case before us, the opinion of one who had knowledge of horses was received, to show the comparative worth or goodness of the horse in question. If, in the former case, the opinion was not a matter of science, art, or skill, as it was there expressly held, much less can it be so regarded here, where the matter may well be considered as within the knowledge of the jurors, few of whom are likely to be ignorant of what constitutes the worth or value of horses. It is laid down by *Doe, J.*, in *Jones v. Tucker*, 41 N. H. 547, that "experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or

when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance ; or, when it so partakes of science as to require a course of previous study, in order to the attainment of a knowledge of it ; and the opinions of experts are not admissible when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits of study in order to qualify a man to understand it."

That the question of the value of property does not come within the principle which admits the opinions of witnesses, is settled by a great weight of authority in this state. *Rochester v. Chester*, 3 N. H. 349 ; *Peterborough v. Jaffrey*, 6 N. H. 462. In these cases the rule was applied to land. *Beard v. Kirk*, 11 N. H. 397 ; *Robertson v. Stark*, 15 N. H. 109. These cases respected the value of a sled, horses, harnesses, and wagons ; and, in the latter, *Parker*, C. J., says, there is nothing in the study or ordinary observation of horses and harnesses which entitles a witness to be introduced as an expert in relation to the value of such property. *Hoitt v. Moulton*, 21 N. H. 586. The same general doctrine is recognized in *Concord Railw. v. Greeley*, 23 N. H. 237 ; *Patterson v. Colebrook*, 29 N. H. 94, confining opinions to questions of science and skill ; and so are *Spear v. Richardson*, 34 N. H. 428, and *Page v. Parker*, 40 N. H. 59.

If then the opinions of witnesses, as to value, are not directly admissible, they cannot be indirectly adduced, by stating a sale of other horses, and the prices received for them, and that the horse in question was of equal or greater value. Instead of this, the horses should be described, and the jury left to judge for themselves. In *Whipple v. Walpole*, 10 N. H. 130, the witness was permitted to state what horses like those in question cost in the vicinity ; but the only question decided appears to have been, that a witness may testify as to the market value of property at any particular time and place, — for that is matter of fact and not of opinion, — and the attention of the court was not drawn to the point, whether the comparison between the horses sold and those lost was not matter of opinion ; nor does it appear that this point was made by counsel. On the other hand, the rule in *Rochester v. Chester*, 3 N. H. 349, is expressly recognized. The case of *Hackett v. Railw.*, 35 N. H. 398, might, at first, seem to go further, as it was held that a witness might state that he had sold

lumber like the boards in dispute at certain prices ; but it will be observed that boards are included among the articles that are sold in market, according to surveys, as to quantity and grade, and the court say, that to judge of the qualities of lumber is, to a great extent, a matter of art and skill, peculiar to those whose business renders them conversant with matters of this kind ; thus plainly distinguishing it from the cases concerning the value of land, horses, and other property, which does not require any peculiar study and skill to understand its value. This, then, is not an authority for the admission of the testimony under consideration. Upon these views, we are of the opinion that this evidence of value was not admissible.

As to the claim for the payment made to Addison Gilmore, for his aid and services, it may not be necessary to investigate it fully at this time, especially as it does not appear distinctly whether any, or if any, what, services were rendered by him ; whether the corporation, having knowledge thereof took the benefit of them ; or whether the plaintiff engaged him, and paid him under the authority of the corporators and their associates, or a majority of them. The defendant asked the court to charge the jury that the plaintiff was not entitled to recover any thing for the horse delivered to Gilmore, which the court declined to do ; and, as we understand the case, the refusal so to instruct the jury was proper ; it being a question of fact whether services were rendered by Gilmore, and paid for by plaintiff in behalf of the corporation, and which it afterwards, with a knowledge of what had been done, adopted and took the benefit of ; or whether Gilmore was so employed and paid under the authority of the corporators and their associates, or the major part of them. In either event, as in the case of services rendered by the plaintiff himself, he would be entitled to recover what he reasonably deserved to have.

It may be urged in respect to the claim for services by Mr. Gilmore, as well as those by the plaintiff himself, that they were merely gratuitous, rendered by him and many other individuals, having private interests to be advanced by the enterprise, without any agreement or expectation to pay, except the incidental benefit to be derived from the railway. If it were so, then no power to pay would be implied from the fact of accepting and taking the benefit of the subscriptions so obtained. But whether it were so or not, is a question of fact for the jury to determine upon a con-

sideration of all the evidence in the case; such as the extent and value of the services, the amount of time devoted to it, his communications with the corporators and their associates, requests by them to bestow those services, and assurances of compensation if any are shown; and, generally, any facts that tend to show that the services were rendered upon the understanding that they were or were not to be paid for.

With these views there must be a new trial.

II. — *Powers v. Skinner*, 34 *Vermont Reports*, 274.

An agreement in respect to services as a lobby-agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature is void, as being prejudicial to sound legislation, injurious to the interests of the state, and against wise and just public policy.

The auditor found the following facts: —

“That at the session of 1853, bank charters were asked for at Northfield, Bradford, Waterbury, Jamaica, Springfield, and Royalton; that such applications had been advertised and were known to the parties, at the time of the plaintiff's employment; that early in the session, the respective friends and hired solicitors for the respective charters began to combine their forces, and consult upon the most feasible plan to accomplish a common purpose, — to obtain special bank charters. The general banking law was deemed one great impediment, and they combined their forces, so far as practicable, to overcome that impediment, and this was done with the concurrence of the parties to this suit, and the agents and solicitors of the several charters. They consulted upon the policy of putting the strongest case forward, that it might clear the way for the weaker, and ‘draw after’ it those of ‘less bottom and strength.’ The plaintiff advised to put Northfield forward; and it was so done. The friends of the several charters, generally, labored and voted for the Northfield charter, under the expectation and agreement that Northfield should stand by and help the others. The several applications prevailed. Without such ‘log-rolling’ combinations, doubtless many, or at least some, would have failed; but the auditor knows of no instrument by which the exact merit of the Royalton application can be measured; nor can he determine what would have been its fate before that legislature had it stood alone, or upon its own merits.

“The plaintiff was energetic, shrewd, laborious, and faithful. The auditor does not find that the plaintiff made any agreement to use improper means to obtain his ends, yet he was, doubtless, expected to appropriate to his use such agencies as were effecting other measures, and thus possess the aggregate strength of all; for such things have long been in use in our legislature, and, at least, sanctioned by usage.

“The fact that an unusual number of measures, of a local and private nature, before the legislature at that session, induced formidable organizations by pressure without and combination within, to effect the ends proposed, is perhaps the main reason why ‘log-rolling’ was so rampant and mischievous at that session. The auditor has no doubt that legislation often ‘suffers a detriment,’ and did at that session, from those outside agencies, which in common parlance are called log-rolling. When measures drag hard there is great temptation to resort to means more desperate, even downright corruption.

“But the auditor does not think that the plaintiff should be affected by the acts of others, even of those who labored for the same end for which he contended, except so far as he sanctioned them. There was no proof that the plaintiff lent his aid to any measure that he did not believe to be right; he favored honestly, no doubt, banks at Northfield and Bradford, and appropriated, so far as he could, the friends of them to subserve his own purpose—a bank at Royalton, and did this by a mutual understanding, among the friends of each, to render mutual aid. If this vitiates the contract, the plaintiff should be affected by it. If the plaintiff recovers upon the contract, he should recover five hundred dollars and interest from the first day of May, A.D. 1854.

“If the plaintiff should recover, as of a *quantum meruit*, the auditor finds that the plaintiff paid out for board and railroad fare, &c., one hundred dollars. As to the value of his services,—if they are to be valued by the end attained, his charge, in the opinion of the auditor, is extravagant.

“If the ‘*quantum*’ is determined by the plaintiff’s capacity to organize numbers into a unit, and to hold them steadily to one purpose, against opposition, and ‘against odds,’ his services are valuable. Without his services, it is quite probable no charter would have been obtained.

“If he should recover what solicitors in such service, of leading

talents, usually receive, the auditor thinks he should recover two hundred and eighty dollars and interest from Jan. 1, 1854.

“The auditor finds that no contract was made that the plaintiff should use any specific means to effect his purpose, but was expected to and did solicit members of the legislature in behalf of his project, as he had opportunity.

“The plaintiff was a doctor, and not a lawyer, and was employed by reason of his ability, and the facilities he possessed to influence the legislature; and his former position in the House of Representatives, and familiarity with legislation and with members, was one of these facilities.

“It was known to some extent that the plaintiff was employed for the Royaltan Bank, and there was no proof that he used any stratagem or other means to conceal his relation, but, in his solicitations he did not generally declare or promulgate that he was hired or employed, but when asked he did not evade or conceal the fact.”

On the foregoing report, the court at December term, 1857, *Redfield*, Ch. J., presiding, rendered judgment for the defendant, to which the plaintiff excepted.

Upon the foregoing facts, the opinion of the court was delivered by

KELLOGG, J. Courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy. *Clippenger v. Hepbaugh*, 5 Watts & Serg. (Penn.) 315; *Wood v. McCann*, 6 Dana (Kentucky), 366; *Marshall v. Balt. & Ohio Railw. Co.*, 16 Howard (U. S. Sup. Ct.), 314; *Harris v. Roof's Ex'rs*, 10 Barb. (Sup. Ct.) 489; *Rose et al. v. Truax*, 21 id. 361; *Bryan v. Reynolds*, 5 Wis. 200. The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was

done, or was expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature, as well as to conduct a suit at law, and may contract for, and receive, pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases. *Sedgwick v. Stanton*, 14 New York (4 Kernan), 289. Our government, in theory, is founded on the most exalted public virtue, and the principle which forbids the legal recognition of any contract for such services is so essential to the purity of the government, and is so firmly established as a rule of public policy, that it requires no vindication. It has not been questioned by counsel in argument, and no member of the court has had any doubt in respect to its propriety, or any hesitation in recognizing its authority. It is equally well settled that where a contract is an entire one, and contains an element which is legal, and one which is void as being against public policy, it cannot be sifted, so that the legal service rendered under it, or in its pursuit, can be separated from the illegal service, and a recovery had for so much of the service as would, if considered by itself, be adjudged to be legal. If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained on it. *Chitty on Contracts*, 536, c.; *Filson's Trustee v. Himes*, 5 Penn. 452; *Rose et al. v. Truax*, *ubi supra*.

“The plaintiff seeks to recover in this action for services rendered by him before the legislature of this state in the year 1853, in aid of an application for a charter for a bank at Royalton, under a contract or agreement made with him by the defendant; and he

relies upon the contract as the only ground for the defendant's liability. The important question in the case, therefore, is, whether the contract relied on to support the plaintiff's claim contained any illegal element or feature; and this must be determined by the facts reported by the auditor in reference to the character of the services which the contract called for, as understood by the parties. On this point in the case, we have not had entire unanimity in our conclusions; but our difference of opinion arose exclusively upon the interpretation of the auditor's report, and not upon any principle applicable to the facts stated by the auditor.

"In the case of *Norman v. Cole*, 3 Esp. 253, it was held that assumpsit would not lie to recover back money deposited for the purpose of being paid to a person for his interest in soliciting a pardon for a person under sentence of death, and, on the case being opened, *Lord Eldon*, Ch. J., expressed a doubt whether the action was maintainable, 'saying that he would hold the plaintiff to very strict proof of the means used to procure the pardon.' The reason and spirit of this remark is, in our judgment, especially applicable to claims for services like those charged in the plaintiff's account. Such services should clearly appear to be legitimate, or they cannot be recognized as the basis of a legal claim. The auditor has found that the contract was a promise on the part of the defendant to pay the plaintiff five hundred dollars 'in consideration that the plaintiff engaged to *labor faithfully* before the legislature of 1853 for a charter of a bank at Royalton.' This statement of the contract, taken by itself, throws but very little light on the character of the services which the plaintiff expected or undertook to render, and is consistent with the claim that no illegal service was contemplated or stipulated for by the contract; but the auditor has also found that while no contract was made that the plaintiff should use any specific means to effect his purpose, 'he was expected to, and did, solicit members of the legislature in behalf of his project as he had opportunity.' A majority of the court are of opinion that this statement is equivalent to an express finding by the auditor that the contract, as understood by the parties, contemplated the use or exercise by the plaintiff of his personal solicitations and influence with individual members of the legislature in support of the application which he was employed to favor and promote; and the other facts reported by the auditor, if they do not strengthen this conclusion, cannot be regarded as

impairing it, or as furnishing any aid to the plaintiff's claim. The only services rendered by the plaintiff which are stated or described by the auditor in his report are clearly such as cannot be made the subject of a legal claim. The law lends no sanction or support to contracts for such services, but leaves the party who seeks the wages for his service to rely on the honorary obligation alone. It is not within the province of courts of justice to balance or adjust the equities growing out of such transactions. In this view of the contract under which the plaintiff's services were rendered, it is apparent that it contained an illegal element, and was, for that reason, wholly void. As the plaintiff's claim rests upon no other ground for support, there can be no recovery upon it.

"Judgment of the county court in favor of the defendant, upon the auditor's report, affirmed.

"BARRETT, J., dissenting. As I am unable, after having heard this case three times argued, to concur with the majority of the court, in the conclusion to which they have come, I deem it due to myself, and to the case, briefly to state my views.

"The argument on both sides, and the decision have proceeded upon the ground, that the rights and liabilities of the parties arise from, and stand upon, the contract that was made between them for the services to be rendered by the plaintiff, in behalf of procuring the charter of a bank at Royalton. There is no difference of view between counsel, or between the members of the court, as to the principles and rules of law which govern the subject of this kind of contracts.

"What the contract was, in this case, was submitted to the finding of an auditor; and it is to the contract, as a majority of the court understand that *he has found it*, that they have undertaken to apply the law, which rightfully governs, in pronouncing whether it be valid or void. If the contract, *which the auditor has found*, constituted or embraced an agreement for the doing of any thing illegal by the plaintiff, on account of being against public policy, or good morals, it should be declared void. If it was free from such view, then, it is agreed that it should be upheld.

"The important inquiry is, what really has the auditor found the contract to be?

"This seems to be comprehensively and explicitly answered in the report: 'A promise on the part of the defendant to pay the

plaintiff five hundred dollars, in consideration that the plaintiff engage to labor faithfully before the legislature of 1853, for a charter of a bank at Royalton.' In another part of the report, the auditor states, that 'he does not find that the plaintiff made any agreement to use improper means to obtain his ends.' The defendant does not assert any failure of performance, on the part of the plaintiff; and the auditor finds, that the plaintiff was energetic, shrewd, laborious, and faithful.

"The defence has, in no degree, rested on the *manner* of the performance by the plaintiff; nor has the decision of the court, as I understand it; but exclusively on the *quality of the contract* made by the parties. This is the only tenable ground of defence.

"In Lord Howden *v.* Simpson, 37 E. C. L. 249, Ch. J. *Tindal*, says, 'the quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and if there did not *then* exist the intention of deceiving the legislature by concealing from it, whilst the petitioners were asking for one set of favors, the purpose of afterwards asking for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment.'

"All agree that it is lawful for persons, interested in procuring some specific enactment, to procure and use the aid of others before the legislature for that purpose. The contract, by which such aid is procured, becomes unlawful only when it embraces an agreement that the person employed is to use improper means to influence the action of the members of the legislature,—such as personal solicitation, *log-rolling*, bribery, and the like. All agree that upon the contract, as it is above set forth, no illegality is apparent. When, therefore, that is followed in the report by the statement of the auditor, that 'he does not find that the plaintiff made any agreement to use improper means to obtain his ends,' elements of illegality *as matters of fact*, as it seems to me, are conclusively excluded from the contract which the auditor has found to have been made by the parties, unless the court may exercise the prerogative of either disbelieving the auditor, or of passing over him, on matters of fact resting in evidence that is addressed to him alone.

"It is true that the auditor has diffusely set forth many things that were done during that session of the legislature in reference

to procuring charters of banks, in which the plaintiff participated ; and if the doing of those things had been stipulated for in the contract of employment, without doubt it would have tainted it with fatal illegality. But as they were all done subsequently to the making of the contract, they could at most have been *matters of evidence*, to be considered by the auditor in determining what was the contract. See *Lord Howden v. Simpson*, cited above, p. 249, 250. He has also interspersed his statement of these things with many judicious moral hints and suggestions, in a manner that shows that such things would have full weight with him as evidence in their tendency to prove an illegal agreement between the parties. Yet, in view of all the things he has stated, as well things that had transpired under his own observation, and in relation to other matters (of which he seems to have taken judicial cognizance), as those shown by the evidence, and connected with the subject of procuring the charter in question, and influenced by the impression they would make upon such moral sensibilities as his report shows him to possess in this respect, he avows that ‘ he does not find that the plaintiff made any agreement to use improper means to obtain his ends.’ In the face of that negation by the auditor, it is new doctrine to me that it is either the duty or the right of the court to find that the plaintiff *did make an agreement to use improper means*, — the fact upon which the whole ground and theory of the defence and the decision are made to rest. It is needless to repeat what has passed into the common maxims, that the express finding of a contract, or other matter of fact, precludes *all implications* in modification of such finding.

“ Great stress was laid in the argument by the defendant’s counsel, and in the opinion that was read in announcing the decision, upon two expressions in the report, one following the language last above quoted, and constituting a kind of antithesis to that quotation ; viz., ‘ Yet he was doubtless expected to appropriate to his use such agencies as were affecting other measures, and thus possess the aggregate strength of all ; for such things have long been in use in our legislature, and at least sanctioned by usage.’ Two remarks are elicited in respect to this. First, it seems to me obvious from the structure of the expression that it was not designed to convey the idea, much less to state as a fact, that the plaintiff was so cognizant of such expectation, or so responded to it, at the time the contract was made, as to cause it to

constitute a part of the contract. If such had been the design the expression would have been differently framed. Instead of saying 'he was expected,' it should have been, 'it was expected' that he would appropriate,' &c., or, 'he expected to appropriate,' &c., which forms of expression are capable of including the plaintiff as a party to such expectation, while that used by the auditor excludes him as a participant in the expectation. The expression used implies an expectation only on the part of others, and not on the part of the plaintiff himself.

"Taken in connection with such structure of this expression, the preceding clause seems to me to be conclusive and absolute, in showing that the auditor did not design to convey any idea that such expectation entered into the contract. The other remark is, that the closing clause of the sentence indicates that he designed said expression only as one of his free comments, and not as the finding of any fact in qualification of the contract, as at first stated by him, and afterwards guarded by his negation of finding any agreement by the plaintiff to use improper means. His expression, 'yet he was doubtless expected,' &c., instead of being a conclusion of fact from the evidence adduced on the trial, was obviously a remark suggested by the auditor's personal familiarity with the usages attendant upon legislation.

"The other expression, on which stress is laid as above stated, is in the answer to the first request, the last clause; viz., 'but (plaintiff) was expected to, and did solicit members of the legislature in behalf of his project as he had opportunity.'

"The remarks that I have made as to the former of said expressions are applicable in the main to this. The form of the expression is inconsistent with the idea that the auditor designed by it to state as a fact found by him that the plaintiff was a party to the expectation named. It is consistent only with the idea that he meant to represent such expectation as being entertained by others, and not concurrently by the plaintiff and defendant at the time of the making of the contract between them, in any such sense as to enter into and qualify the contract as at first stated in the report. If I am wrong in these views, I have only to confess that the language of the report effectually *conceals*, instead of revealing, to my mind and apprehension the idea and meaning of the auditor.

"The auditor in this case fully understood his province and duty.

He understood the essential elements of a contract, and the law of just implications, as well as of express terms, in determining what, *in point of fact*, was agreed between the parties. When he, therefore, stated explicitly what he found to be the contract, it was the contract as educed from all the evidence bearing on the subject, embracing as well what was actually expressed between the parties, as what was legitimately and fairly to be implied from all that transpired in relation to the subject-matter of the contract ; *it was the statement of the terms to which the minds of the parties concurrently consented*, whether shown by direct proof of the language used by the parties, or inferred from the circumstances and incidents that made up the history of the entire enterprise from its first suggestion down to the final act. The undertaking of the defendant was to do a single act ; viz., *to pay the plaintiff five hundred dollars*, the consideration for which was that the *plaintiff engaged to labor faithfully before the legislature, for a charter of a bank at Royalton*. I fail to find in the report any statement of any other or further consideration for the promise to pay the five hundred dollars, any engagement on the part of the plaintiff to do any thing but what is implied in laboring faithfully : and to preclude any inference or implication of any unlawful service to be rendered under the engagement, the auditor expressly negates finding any agreement to that effect.

“I have always understood that in order to warrant the pronouncing of a contract void on account of its being tainted with immorality, such taint should be proved and found in the mode prescribed by the law, not guessed at and presumed. But I am compelled to say in this case that it seems to me such taint is assumed by the court to exist when the contrary is explicitly found by the auditor, to whom alone the evidence of facts is addressed, and who, by his express finding of the contract, both affirmatively as to terms and negatively as to the view asserted by the defendant, is fatal to its validity, has left to the court no vocation of inference or implication as to facts.

“While I trust that I am not behind my brethren in my disapprobation of such practices as the auditor represents for securing success to measures before the legislature, nor in my readiness to apply the law in avoiding any contract that should embrace an agreement for the doing of such practices, I am unable to follow them in pronouncing a contract void which, as I understand the

report, does not embrace ‘*any agreement to use improper means*’ in behalf of the measure which the plaintiff was employed by the defendant to serve.”

We do not apprehend that much light is now likely to be thrown upon the rule of law adopted by the courts, in regard to sustaining actions upon contracts tainted with illegality, or against sound policy, or good morals. It is probably true, as has often been said, that the party invoking the aid of the court, in maintaining his defence, is quite as likely to have been the primary mover in the iniquity, and only induced to affect penitence, because he has been outwitted by a more adroit adversary. But it must always be borne in mind that this defence is allowed, not for the sake of the defendant, nor mainly on account of the example thus afforded of vindicating honesty and fair dealing; but chiefly because the courts will not give countenance to a violation of law, good order, decency, or morality, by affording any remedy, or redress, for alleged wrongs, or violations of contract, where the claimant's assumed rights rest, in any sense, or to any extent, upon the basis of bad faith, in having any participation in such violation. The opinion of the Supreme Court of Vermont, in *Territt v. Bartlett*, 21 Vt. 187-191, contains our views upon the general question. We had occasion, too, to discuss the general subject somewhat in detail, in the case of *Spalding v. Preston*, id. 10-16. In the former case it is said, —

“A contract, then, which has for its object, or which contemplates, any act prohibited by express statute, or the commission of which incurs a penalty, is as much illegal and void, as if the statute in express terms so declared. Hence all spirits sold here, in violation of the license laws, can never form the basis of a recovery in our courts. But in a case precisely like that of *Holman v. Johnson*, 1 Cowp. 341, where the sale and delivery were both made in another state, and the seller did nothing to promote the illegal object, except what was necessary to pursue his own lawful business in the foreign state, although he might have known the illegal purpose contemplated by the vendee, I should have no doubt an action would lie in our courts. It might fairly be said, that the mere knowledge of the illegal purpose of the vendee is something which the vendor could not avoid; and, at the same time, something which he could not regard without prejudice, and unjust prejudice, to his own lawful business, and that out of regard to the law of a foreign state, which, properly speaking, could have no extra-territorial force. It would be, then, wholly consistent with the most scrupulous regard to duty and morality, for one to make such sale in the lawful pursuit of his own business, in his own country, and this is all that the case of *Holman v. Johnson* decides. But that reasoning will not apply to the case of a sale made here. And that is a case, which comes up to the utmost limit of sound doctrine. And so it has been considered in the English courts. *Biggs v. Lawrence*, 3 T. R. 454. That is the case where the vendor of brandy, in *Germany*, packed it in ankers, in preparation for smuggling, and it was held, he could not recover the price, because he was thus implicated in the unlawful purpose. What is done abroad, beyond the mere business of the vendor, and specially to promote the illegal design of the vendee, is justly referable to the place where the unlawful design was to be accomplished, and so is a violation of the law of

that state, although transacted in the foreign country. This is made very obvious from the simple illustration of principals and accessories in crime. It has been held, that one, who never came within the state, may even be the principal, in a case of uttering forged paper, by merely putting it off, through the instrumentality of the post-office. So, too, it has always been held, that one, who, in one county, commits or aids in the commission of crime in another county, is an accessory to the crime in the other county, and may be tried and punished there; and if he commit the crime through the instrumentality of an innocent agent, he is a principal in the crime in the county where it is committed, although never present there.

“The rule upon this subject is, we think, correctly laid down in *Langton v. Hughes*, 1 M. & S. 593. Lord Ellenborough says, ‘Without multiplying instances of this sort, it may be taken, as a received rule of law, that what is done in contravention of an act of parliament cannot be made the subject-matter of an action.’ That was the case of drugs sold to a brewer, *with the knowledge* that they were intended to be used in brewing, contrary to the provisions of the statute. For this, merely, the seller was considered a participator in the illegal purpose, and it was considered unimportant whether the drugs were in fact put to the illegal use or not. That case has never been doubted, but always followed. *Cannan v. Bryce*, 3 B. & Ald. 179. The rule laid down by Chief Justice Eyre, in *Lightfoot v. Tenant*, 1 B. & P. 551, that one who sells goods, *in the place of the forum*, knowing they are intended to be put to an illegal use there, cannot recover the price, although going perhaps somewhat beyond the case now before us, has been approved and followed, and may now be considered the settled law upon the subject. This rule was distinctly recognized in this court, in *Case v. Riker*, 10 Vt. 482.”

The case of *Spalding v. Preston* was an action of trover to recover of the sheriff the value of certain counterfeit pieces of German silver, in the shape of Mexican dollars, and intended to be finished and put in circulation, which the sheriff had taken from the defendant on his arrest for crime, and which he was detaining as evidence against him. It is there said, —

“Courts of justice will not sustain actions in regard to contracts, or property, which have for their object the violation of law. If a gang of counterfeiters had quarrelled about the division of their stock, or tools, a court of justice could hardly be expected to sit as a divider among them. If one had taken the whole, in violation of the laws by which such associations subsist, a court of law could not interfere, because it is not presumed to be expert in such questions. And if it were, it is considered a public scandal, that such matters should be there discussed, or adjusted. Such property is, so to speak, *outlawed*, and is common plunder. One who sets himself deliberately at work to contravene the fundamental laws of civil governments; that is, the security of life, liberty, or property, forfeits his own right to protection in those respects wherein he was studying to infringe the rights of others. The man who attempts the life or the liberty of another, forfeits, for the time, all right to the protection of his own life, or person; and the person assailed may justly destroy both, if necessary, in his own defence, or if he may be fairly supposed to have esteemed it necessary, under the circumstances.

“So, too, if any member of the body politic, instead of putting his property

to honest uses, convert it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his *bona fide* interest in such property, before it was put to that use. And he can, I apprehend, sustain no action against any one who withholds or destroys his property, with the *bona fide* intention of preventing injury to himself or others.

“A distinguished English judge, Lord Ellenborough, I think, once said, in the trial of an action in the king’s bench, in regard to an illegal contract, that he would not condescend to sit, as an arbitrator, in regard to the division of spoil among highwaymen. What he would have said, had one of the gang presumed to bring *trover* against the sheriff of London for an unreasonable detention of the booty during the pendency of an indictment against an accomplice, it is difficult to conceive. If such a plaintiff *got out of court* without *getting into Newgate*, with his accomplices, he might esteem himself fortunate. This is, doubtless, the first action of the kind to be found upon the records of any court; but we are aware, that, for that reason alone, it by no means follows that it will be the last. We live, we know, in an age of improvements and discoveries. ‘New customs, be they never so ridiculous, nay, be they unmanly, yet are followed.’ It is by no means certain that this kind of action may not hereafter be ranked among the bold innovations and masterly advancements of the age. My Lord Holt said, that he was a bold man, who first ventured to use the general counts in assumpsit, notwithstanding that had then become the general mode of declaring in that action. And the courts have been constantly extending and facilitating remedies for every wrong; so that we would not have the plaintiff despair of even this remedy soon being firmly established in precedent and practice. But at present *its novelty is so glaring*, that *we dare* not venture to adopt it.”

POWERS OF COMMISSIONERS IN ORGANIZING CORPORATIONS.

Walker v. Devereaux, 4 Paige, 239.

This subject is of considerable practical importance in the inception of corporations; but as objections, to be of any avail, have to be interposed at the earliest convenient time, it will not be likely to invite much litigation. But as the leading opinion upon the subject in *Walker v. Devereaux*, *supra*, by Chancellor *Walworth*, discusses the whole subject in a manner which has proved satisfactory to the profession, it will be desirable to give the opinion at length, with brief notes of the points decided.

The bill was brought for an injunction restraining the defendants from holding a meeting of the shareholders in the Utica and Schenectady Railway for the election of directors, and also from parting with the shares allotted to them by the commissioners.

The commissioners were appointed by the special act of incorporation to receive subscriptions for stock and to distribute the same, and call a meeting of the shareholders for the election of directors.

The hearing was had upon application for an injunction and upon the appearance of defendants. It appeared that there were 2,909 subscribers for stock, and that stock was distributed to but 1,423 of that number, the others being notified to receive back the money deposited by them in payment of the first instalment, and that the complainant had received his money back, and given a receipt for the same, he being a subscriber for thirty-five shares, and having paid five dollars on each share at the time of his subscribing. Some of the shares had been sold to *bona fide* purchasers for an advance upon the cost, before the bill was brought. It was claimed that the stock had been arbitrarily distributed by the commissioners to themselves and their friends.

POINTS DECIDED.

The act of incorporation did not become operative in creating a corporation, until the subscribers to the stock were determined. It was therefore indispensable that the commissioners should distribute the stock, and decide who were entitled to hold it.

The commissioners in receiving subscriptions did not act in the capacity of agents or trustees for the subscribers, but rather in that of public officers; and if they had omitted to open the books for receiving subscriptions, or to apportion the stock according to the requirements of the statute, they might have been compelled to perform these duties by mandamus.

If in the distribution of the stock it is assigned to any one not entitled to hold it, the apportionment is not void; but such subscriber will in equity be regarded as holding it in trust for all the subscribers or for the party entitled.

A party who claims to have been injured by a wrong distribution of stock in such case, and who seeks redress, should file his bill in behalf of himself and of all others interested in the distribution, and should make all those to whom stock has been distributed defendants, so that the court can have all parties interested before them. The commissioners do not represent those parties to whom the stock has been distributed by them.

The bill should contain a prayer for preliminary injunction, if that is desired. The complainant by receiving his money, deposited in payment of the first instalment, has relinquished all right to interfere in this mode.

If the commissioners have a discretion to distribute the stock as they deem most for the interests of the corporation, they are not obliged to give a portion to each subscriber.

Where a distribution is required to be made among all the subscribers and no discretion is vested in the commissioners, it must be made among them all in proportion to their subscriptions. But if the person making the distribution has an arbitrary discretion in selecting the persons to whom the distribution shall be made, he may distribute it all to one or more, as he sees fit, and no court has any power to revise the exercise of such discretion, provided it is done in good faith.

By the settled practice in this state, the commissioners were justified in becoming subscribers and in apportioning shares to themselves.

In cases where commissioners have such a discretion in the distribution of the stock as these had, it is a fraud upon them and upon the law for persons to subscribe for stock in their own names, under a secret agreement to hold it in trust for others, if stock should be apportioned to such subscribers, this being done with the purpose of securing stock to such persons as the commissioners would not allow to hold it. Such a trust, being illegal, is void ; and the subscriber acquires absolute title to the shares assigned him, as against the person for whose benefit he made the subscription ; and in order to compel such subscriber to surrender the shares assigned him for the benefit of other *bona fide* subscribers, the bill must be brought against him.

OPINION BY WALWORTH (CHANCELLOR).

The act under which the commissioners opened books of subscription to the capital stock of the Utica and Schenectady Railway Company, did not create a corporation *eo instanti*, when that act took effect as a law. It only constituted such persons a body corporate as should thereafter become stockholders, in the manner prescribed in the act. If the whole corporate stock, and no more, had been subscribed, within the three days during which the commissioners were bound to keep the books open, then those persons who had thus subscribed and paid their money to the commissioners, would have acquired legal rights as corporators. And they would also have had the right to call upon the commissioners, not as their agents or trustees, but as agents or officers of the public, to notify an election of directors, and to preside as inspectors thereof, by a committee of their body, as directed by the act. But in the event which has happened, of an excess of subscription, no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in the stock, as the legal owner thereof, so as to authorize him to vote upon it, or to transfer it as stock, until a majority of the commissioners have proceeded to apportion the same, and to designate the persons who are to be the stockholders, and the amount which each is to receive. It is evident, therefore, if the counsel for the complainant are right in supposing that the distribution in this case was absolutely void, and not merely voidable, that the election of directors, which they now seek to restrain by injunction, cannot possibly affect the rights of their client. As there could be neither a corporation nor stockholders in existence until after the stock was apportioned, the commissioners did not hold the stock, nor did they act, in the character of officers, servants, agents, or trustees

of the corporation or of the subscribers. But they acted merely as officers or agents of the government, appointed by the legislature, to assist in the organization of a corporation and to create a stock in the same. The legislature might by law have designated the stockholders, as they had done in the case of other corporations, or they might have delegated that portion of their authority to others. But as they did not delegate that power to the courts, neither this or any other court has the power to create a corporation by designating who shall be the persons to hold stock in the same. The appropriate tribunal, however, upon a proper application, may compel the commissioners to open books, to apportion the stock in the manner prescribed by law, and to notify and by a committee of their body preside at the election of the directors. Such tribunal may also decide as to the proper construction of the act of incorporation, and can enforce a compliance with such decision. If the apportionment of the stock in this case was absolutely void, as the complainant insists it was, he has mistaken his remedy. He should in that case have applied to the supreme court for a mandamus, to compel these public officers, or agents of the legislature, to distribute the stock, as required by the statute. And if it was necessary to apply to this court either for a discovery or an injunction, in aid of, or as ancillary to his remedy at law, he should have stated in the bill either that he had applied, or that he intended to apply, to the legal tribunal for relief. (*Jones v. Jones*, 3 Meriv. 173.)

I apprehend, however, the complainant is under a mistake in supposing that the apportionment of stock in this case was absolutely void. It was at the most voidable, even upon the principles upon which the complainant supposes it was absolutely void. And if any portion of the stock has been apportioned to persons who ought not to hold it, or if any one has received more than his share, under circumstances which would amount to a fraud upon the commissioners, or upon the law, such persons must be deemed to hold it for the benefit of all or some of the subscribers who have received no stock, or who have not received stock to the extent of their subscriptions. Here, however, another difficulty presents itself upon the face of the complainant's bill. He shows that from one-third to one-half of all the subscribers, and who had as much right to a portion of the stock as himself, were excluded from any participation in the same, by the apportionment of the

commissioners. And it can hardly be presumed that even those to whom stock was assigned, obtained the full amount of their subscriptions. The complainant has shown by his bill that all these had relinquished their rights, or he should have filed his bill in behalf of himself and of all others who might choose to come in under the decree. (*Baldwin v. Lawrence*, 5 Sim. & Stu. 18; *Egberts v. Wood*, 3 Paige, 520.) Again; the complainant seeks an injunction which must necessarily affect the interests of every *bona fide* stockholder to whom stock has been assigned, or who has purchased in good faith since the distribution. And I am not prepared to say, if this election is not held, that the commissioners have any power or authority to fix upon another day. The general provision in the revised statutes (1 Rev. Sts. 604, § 8) does not apply to the first election, before there is any president or directors to fix upon and notify the election on a future day. The defendants in this case are not the trustees, and do not represent the interests of other persons to whom stock has been assigned. On the contrary, for aught I can legally know, they may have an interest adverse to that of the other stockholders. It would therefore be improper to grant an injunction which might eventually destroy the interests of those stockholders, without giving them a chance to be heard. This court unquestionably has the power to prevent this election, by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of a corporation. But in the exercise of such a power, the court should require ample security from the complainant to pay all damages other persons might sustain, by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant that he is informed and believes the existence of a fact, may be a sufficient ground to authorize the issuing of an injunction, against a defendant who has had an opportunity to deny the allegation if it is unfounded. But it is not sufficient to justify the court in destroying or injuring the rights of others, who have had no opportunity to be heard either by themselves or by those who are under a legal obligation to protect

their rights. In such a case, in addition to the usual allegation of the complainant, that he is informed and believes the fact, he should annex the affidavit of the person who knew that fact, from whom the information was derived. The complainant may honestly believe that some or all of these commissioners have been guilty of every thing which is charged against them in this bill, and yet he may have obtained his information from those who had no more actual knowledge on the subject than himself; or from one who has intentionally deceived him, for the purpose of depressing the stock of the company by this litigation, so that it might be obtained at a lower rate.

There is also another fatal objection to the granting of a preliminary injunction, in this case, which was not adverted to on the argument; which is, that there is no prayer for such process in the complainant's bill. A final injunction may be obtained upon the prayer for relief by injunction, or perhaps under the prayer for general relief. But to obtain a preliminary injunction, to restrain the defendants' proceedings pending the suit, there should be a formal prayer for such process, or some other prayer which is equivalent. Thus in the case of *Wood v. Beadell* (3 Simon, 273), an injunction was asked for, as here, in the general prayer of the bill, but as there was no preliminary injunction asked for in the prayer of process, such injunction was refused. The complainant, however, was permitted to renew his application upon an amended bill.¹

I am also inclined to think that the complainant has waived his right to question the correctness of the distribution of the stock, by voluntarily withdrawing from the hands of the commissioners the moneys which were required to be paid on subscribing. On this point, however, I do not wish to be considered as having formed a definite opinion, as I have not had leisure to examine it fully. The opinion of Chancellor Sanford, in the case of the Commercial Bank of Albany, is not decisive, as in that case the complainant acquired an absolute right to a portion of the stock, by his subscription; and the corporation, when organized, could have recovered back the money, and have thus compelled him to take the shares of stock which belonged to him upon an equitable distribution. In that case, if the commissioners had any right to apportion the stock otherwise than by a mathematical calculation,

¹ See also *Savory v. Dyer*, Amb. 70; and *Davile v. Peacock*, Barnad. Ch. 27.

or by a division upon the principles of exact equality, it was a power conferred upon them by implication of law, from the necessity of the case. Such power could not, therefore, extend farther than was necessary to prevent the division of a share between two or more stockholders, by determining to which the whole share should belong. In the present case, no absolute right vested in the complainant by his subscription; and he might waive his claim to a portion of the stock, by receiving back his deposit, at any time before he became the legal owner of any part of such stock by the apportionment of the commissioners.

It was not necessary in this case that the commissioners should give to each subscriber an equal, or any other amount of stock. Where a distribution, or apportionment, is to be made between or among any number of persons, or a class of individuals, and no discretion is vested in those who are to execute the power of making the distribution, or apportionment, each individual of the whole number, or class of persons named, is entitled to an equal share. But if the designation of a class or number of persons is made merely for the purpose of pointing out those from whom the selection is to be made, giving to the person intrusted with the power a discretionary right of distributing among that particular class as he shall think proper, then the whole may be allotted to one, or more of that class, to the exclusion of the others. Formerly the question as to the right of the person intrusted with the power to exclude any one of the class designated, by giving what was called an illusory portion, was frequently agitated in the courts, and produced much litigation. But the revised statutes have for ever put that question at rest in this state. By the 98th and 99th sections of the article relative to powers, it is declared, that where a disposition under a power is directed to be made to, or among, or between, several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal portion. But when the terms of the power import that the estate, or fund, is to be distributed between the persons so designated, *in such manner or proportions as the trustee of the power shall think proper*, the trustee may allot the whole to any one or more of such persons, in exclusion of the others. (1 Rev. Sts. 774, and Revisor's Report on ch. 1, pt. 2, p. 61.)¹ Although the power in the present case was to be exercised by these com-

¹ As to personal estates, see, 1 R. S. 773, § 2.

missioners as the officers or agents of the public, and not strictly in the character of mere trustees of a power in trust, yet, as the legislature had established this general principle as one of the fundamental rules of construction, in reference to powers, I must presume they meant the same rule of construction should be adopted in relation to the power granted to or conferred upon these commissioners. The only restriction imposed upon them, therefore, was that they should exercise the power according to the best of their judgment, and apportion the stock to such of the subscribers and in such proportions as a majority of them should deem most advantageous to the interests of the corporation. And there is no allegation in this bill from which I have a right to infer that the complainant believes they have not distributed the stock in this manner. Although it is alleged that the complainant is informed and believes, they have distributed the stock principally among themselves and their relatives and friends, it would only be in accordance with the principles of human nature, were we to conclude, from that circumstance alone, they honestly believed that they and their friends would be more likely to appoint directors who would manage the concerns of the corporation well, than others would if the control of the corporation should be given to their opponents. In this perhaps they may have acted under a mistake, but that alone is not sufficient to authorize an interference with their distribution. Where a discretion is to be exercised according to certain fixed legal principles, especially when that discretion is to be exercised by a person, or body, acting as a court of justice, if the person or body intrusted with the power has mistaken the law, or violated such fixed legal principles, it may be a proper case for review and correction by the appropriate tribunal. But if the legislature has intrusted the exercise of the power to the sole judgment and discretion of a particular person or body of individuals, no court is authorized to interfere with or control that discretion; provided it is exercised in good faith. In the recent case of *The King ex rel. Scales v. The Mayor and Aldermen of London* (3 Barn. & Adolph. 271), the late Lord Tenterden says, "if a matter is left to the discretion of any individual, or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not." The

same principle is recognized in the case of *The King v. The Justices of Norfolk* (1 Nevile & Man. 67), and in a variety of cases in our own courts. This point was also expressly decided by the vice chancellor of the first circuit, in the case of *The Brooklyn Bank* (1 Edward Ch. 371), where the powers of the commissioners were the same, substantially, as in the present case. Chancellor Sanford also admitted the correctness of this principle, in the case which was before him relative to the distribution of the stock in the Commercial Bank of Albany; although he very properly decided that it was not applicable to the case then under consideration. (*Meades v. Walker*, 1 Hopkins, 591.) It is not necessary for the decision of the present motion that I should consider the question whether the commissioners could themselves become subscribers for the stock of the corporation. But as that question has been fully argued, it may save expense to the parties and prevent further litigation in this case, if I proceed to dispose of that objection to the distribution, at this time. The general principles, that a trustee cannot traffic in the subject of his trust, that no person shall be a judge in his own cause, and that a public officer cannot do an act which is inconsistent with the duty he owes to another, or to the public, are well understood. And it certainly does seem to be inconsistent with these principles, that the legislature should, in any case, permit commissioners for the distribution of stocks, to decide between themselves and others what portion of such stock shall belong to the commissioners, and what part they shall award to other subscribers. It certainly would better accord with these leading principles of law, were the legislature to state, in express terms, what portion of the whole stock each commissioner should be permitted to take: and to prohibit him from taking, either directly or indirectly, any greater share, except in a case of deficiency in the amount subscribed. But where it was in the power of the legislature to give all the stock to certain individuals, who had already become subscribers therefor, as was the case in relation to many of the early acts creating joint-stock companies, the legislature might unquestionably confer the power upon such individuals of deciding how much of such stock they would keep themselves, and how much they would apportion to others. The question here is, whether the legislature, in the case now under consideration, expected or intended that these twenty-one commissioners, named in the act of incorporation, should be permitted to

subscribe for and receive a part of the stock of this company. The fundamental principle to be observed in the construction of statutes, is to discover if possible the true intention of the lawgiver. And when that intention is ascertained, the court is bound to give effect to such intention, whatever opinion the judge may entertain as to the wisdom or policy of the law; provided such intention does not contravene any principle of the constitution, or transcend the powers of the legislature. Every thing which is within the intent of the makers of the act, although it be not within the letter, is as much within the act as if it were within the letter and intent also. (*Stowel v. Lord Zouch*, 1 Plow. 366; *Dwarris on Stat.* 691.) Statutes are also to be construed in reference to the law as it existed, or was supposed to exist, at the time of making such statutes. Thus, if certain expressions in a statute have a settled and determinate meaning at the common law, or by a settled judicial construction of the same words in a former statute, the court is bound to presume the legislature intended they should have a similar meaning, or receive the like construction in the new statute. And as one part of a statute is to be referred to for the purpose of ascertaining the meaning of another part, so may other laws, made by the same legislature or upon the same or similar subjects, be referred to for the same purpose. It is therefore proper to refer to the provisions of the several acts authorizing commissioners, and others, to receive subscriptions for and to distribute the stock of moneyed and other corporations, and to the known usage under such statutes, for the purpose of ascertaining whether the legislature intended that the commissioners in this case should be excluded from subscribing or receiving any portion of the stock, on account of the peculiar nature of their official duties in the distribution of the stock in case of an excess. The case of *Haight and others v. Day and others* (1 Johns. Ch. 18), came before this court in 1814, upon a complaint against the commissioners for the distribution of the stock in the Catskill Bank, under a provision in the act of incorporation very similar to that which is now under consideration. The complaint in that case was, that there was a gross inequality in the apportionment among the subscribers; and that the distribution was principally confined to the commissioners themselves, their relations and favorites. The bill also charged that the apportionment was unjust, fraudulent, and corrupt. Yet, upon the answer of the defendants

merely denying that they were governed by any improper motive in the execution of their trust, and alleging that they had apportioned the stock as they deemed discreet and proper, Chancellor Kent dissolved the injunction, and permitted them to proceed, and to elect themselves directors to control and manage the institution.

It is suggested by the complainant's counsel that it does not appear by the report of that case that the objection was there raised, that it was inconsistent with their character as commissioners to distribute the stock—to subscribe for and apportion a part thereof to themselves. It appears to me, however, impossible to suppose the chancellor could have overlooked this general principle, if he had considered it as applicable to the case; for, upon looking into the pleadings in that cause, on file in the register's office, a more appropriate case for the enforcement of that principle can hardly be conceived. The whole stock to be distributed was 6,000 shares: and more than six times that amount was actually subscribed, by one hundred and twenty-three persons, including the twenty-two complainants, who subscribed between five and six thousand shares. Yet the four commissioners took about one-half of the stock to themselves, and gave all of the residue, except 108 shares, to nine of their nearest relatives by blood and marriage, and to two or three other persons connected with them in business. And they distributed the 108 shares among the complainants and others, by giving one share to each. In a case so glaring, I cannot believe my learned and now venerable predecessor would have forgotten or have hesitated to apply this principle, if he had not been satisfied from the course of legislation which had been adopted in relation to the distribution of the stocks of incorporated companies, that there was something which took the case of commissioners and trustees for the distribution of such stocks, out of the operation of the general rule. Whether he was right in his construction of the law as to the powers of the commissioners in such a case, it is useless now to inquire, as his decision has been received and acted on as law ever since that time. And the numerous prohibitions contained in subsequent acts of incorporation, restricting the commissioners as to the number of shares they shall be permitted to distribute to themselves, but without giving them in terms the power to take any, show the understanding of the legislature that such was the established law.

I must therefore conclude, from these circumstances, and also from the fact, of public notoriety, that commissioners have always been in the habit of apportioning a part of the stock to themselves, that the legislature did not intend the commissioners in this case should be excluded from a participation in the stock of the company. As to the amount taken by them, they have restricted themselves far below the smallest maximum which has ever been adopted by the legislature in a similar case. I cannot, therefore, say they have abused the right of appropriating a portion of the capital stock of the company to themselves. Indeed, when we consider that the statute has made no provision for compensating them for their services, and that they must necessarily encounter the risk of the expenses of litigation with those who might honestly suppose their rights had been violated in the distribution of the stock, I can hardly believe the profits on a hundred shares will afford an adequate indemnity to any one of these commissioners; considering them as having some claim to a portion of the stock, independent of their services and responsibilities as commissioners.

As the law had intrusted the commissioners with a discretionary power, to apportion the stock in such manner as should be deemed by them most beneficial to the interests of the corporation, it would undoubtedly be a fraud upon the commissioners, and upon the law, for an individual to subscribe for stock in his own name, under a secret agreement or understanding with another that the stock which might be apportioned to him should be held in trust for the benefit of the latter; provided it was done for the purpose of deceiving the commissioners, and thus inducing them indirectly to give to a person stock, when they would not have considered it for the interest of the corporation to have apportioned the stock to such nominal subscriber, if they had known he was to hold the same in trust for another person. In such a case, however, as the trust would be illegal, and not authorized by the laws of the land, as between the parties to such fraudulent arrangement, the legal title to the stock awarded to such nominal subscriber would be vested in him. If such stock, therefore, could be reached by a suit in this court, for the benefit of all or any of the real subscribers, it would be necessary for that purpose to proceed against the person in whom the legal title to the stock was vested. It would be equally a fraud upon the law and upon the other commissioners, if one of their number should subscribe for stock in the name

of another person, and conceal that fact from his co-commissioners, for the purpose of obtaining indirectly more stock than the majority of the commissioners would have thought proper to have awarded to him, had they been informed he was to be the beneficial owner of the stock thus subscribed for in the name of another. On the contrary, as the statute in this case had imposed no limitation whatever upon the amount which any individual subscriber should be permitted to receive, provided a majority of the commissioners honestly believed it was for the interest of the corporation that he should have the same in preference to others, and inasmuch as it had not prohibited one person from subscribing for the stock, indirectly, in the name of another, it could be no fraud upon the law or upon the commissioners to subscribe in that manner, provided the commissioners actually knew for whose benefit the subscription was made, previous to the apportionment of the stock. The fraud in such cases does not consist in subscribing for stock in the name of another person, but in concealing the knowledge of that fact from those whose duty it is to distribute the stock as they shall deem most beneficial to the interest of the corporation, having a regard to the situation of those who are to be the real owners of the stock apportioned to the nominal subscribers. As it is a general principle that no wrong should be permitted to exist without a remedy, I am inclined to think a fraud of this kind may be reached. But whether it should be by a bill filed by one of the subscribers, in behalf of himself and all others standing in a similar situation, to have the stock thus fraudulently obtained restored to the control of a majority of the commissioners, to be distributed by them in conformity to the principles of the statute; or by a bill in the name of those commissioners who were not parties to the fraud; or by an information in the name of the attorney general, as the protector of the rights of the public, are questions which cannot arise in this cause, and which I am not prepared to decide without argument. It is alleged in this case that *some* or *one* of the commissioners subscribed for stock in the name of another person. But it is not stated who those commissioners were, and it is not alleged that the knowledge of the fact was concealed from the other commissioners; neither is the person, in whom legal title to the stock is vested, made a party to the suit. This part of the bill is manifestly defective; as the complainant is not permitted, by any rule of pleading, to charge some one or more of a larger num-

ber of individuals with a fraud, or with any other violation of the rights of the complainant, and then to call upon each one of the whole number to disclose whether he is the person, who has been guilty of the fraud or injury charged.

The complainant's supposition that certain portions of the stock were set apart as a separate fund for state officers, and editors, and was distributed to them without reference to the fact that they were subscribers for the stock, is contradicted by the affidavit of Mr. Townsend, the chairman of the board, who swears that the whole capital stock was apportioned to 1423 persons who were subscribers for the same.

As the complainant's bill is defective, both in form and substance, and states no sufficient grounds to authorize the interference of this court with the distribution of the stock, as made by the commissioners, the application for an injunction must be denied, with costs.

In *Crocker v. Crane*, 21 Wend. 217, 221, the opinion of *Cowen, J.*, declares the following propositions: —

The securing subscriptions is a ministerial act, and may be done by an agent; but the distribution of it is of a judicial character, and requires the commissioners to act in person, and to be all present and acting; but a majority may decide.

The payment at the time of subscription must be in coin or its equivalent; bankers' checks not so regarded.

Fraud practised by one of the commissioners upon the others will not render their action void.

The learned judge said, —

“As to the defendant's *third* and *fourth* points, the receiving of subscriptions was but a *ministerial* act. Any one had a right to subscribe and pay in the four per cent. Such an act might be allowed by an agent or deputy appointed by the commissioners, or by one, without authority at the time; the acts being afterwards ratified by the board. But the question is different as to the *distribution of stock*. The fourth section provides, that ‘if more than \$650,000 shall have been subscribed, they (the commissioners) shall distribute the said stock among the several subscribers, in such manner as they shall deem most conducive to the interests of the said corporation.’ Statutes, Sess. of 1832, p. 191. Here, it appears to me, is a *judicial power* vested in the commissioners: a power to exercise a discretion founded on such considerations as may appear to them beneficial to the company's interests. These may be various and important, while the decision is, in its nature, beyond the reach of appeal. *Walker v. Devereaux*, 4 Paige, 229. And see *The People ex rel. Case v. Collins*, 19 Wend. 56, 60, &c. Then it has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any

matter, but makes no provision that a *majority* shall constitute a quorum, all must be present to hear and consult, though a majority may then decide. *Ex parte* Rogers, 7 Cowen, 526, 529, 530, and the cases there cited, and see note (a). The statute, 2 R. S. 458, § 27, 2d ed., was passed in affirmance of this rule, which it adopts in terms. The rule has been applied to ordinary commissioners of highways, *Babcock v. Lamb*, 1 Cowen, 238, and a statute was thought necessary to qualify the rule in this case, which has been done slightly, by 1 R. S. 520, § 129, 2d. ed.

“The statute in question, section one, provides that Heman M'Clure, Benjamin Walworth, John Crane, and such other persons as shall become stockholders, shall constitute the corporation, and, if no stock was distributed, there is no corporation. The objection that there was no party payee who could legally receive the check, is unfounded in fact. Saxton was a competent payee. But the awarding and distributing of the stock by the proper authority was a condition precedent to the existence of the corporation. This is the view taken by the present chancellor in *Walker v. Devereaux*, 4 Paige, 229, upon a statute with similar provisions as to the mode of organization under which the Utica and Schenectady Railroad Company was constituted, and which view I am satisfied is perfectly sound. The distribution being conducted throughout by a number of commissioners not sufficient to constitute a legal board, was *coram non judice*, and void. It follows that there never was any corporation. The defendant got no check, and all consideration for the check has failed. See also the reasoning of Lansing (Chancellor), in *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Err. 94, 95.

“With regard to the *fifth* point, the commissioners, in a matter wherein they had a right to act, received *uncurrent money* and *indorsed checks*, instead of *cash*, for the percentage, required by the act to be paid at the time of the subscription. I cannot collect from the evidence that they made any serious stand on the condition that cash should be paid. By cash, I mean specie, or its equivalent in current bills of specie-paying banks. They received uncurrent money for a while, and at last resolved to receive checks, lending an easy ear to the presumption urged upon them, that the drawer of a check had current funds in place. I cannot feel a doubt, on reading the evidence, that the whole was a mere evasion of the statute. In that I certainly differ from the jury to whom the question was left. It ought not to have been left to a jury, whether knowingly paying and receiving uncurrent money was a compliance with the mandate of the legislature. At what discount the money stood does not appear. It must, I think, have been wretchedly worthless, to have been uncurrent amid the inflations of 1836. The checks were received mainly because they were preferred to this uncurrent money. There was some question started whether the drawers had funds; those very drawers too who had, it seems, nothing but uncurrent money to pay. A good indorser was required; but, looking at the whole transaction, this was evidently a substitution of individual credit for cash payment. Giving time of payment was talked of, inasmuch as the money would not be wanted for immediate use. I think the jury fell into a plain mistake when, under the charge of the judge, they pronounced this the ordinary course of receiving checks to effectuate a cash payment. Why are they taken as cash in the ordi-

nary course of business? Because they are a mere transfer of money which a man has at his banker's. I do not deny that receiving an occasional check might have been a fair substitute; but checks being crowded on the commissioners in a mass, because no subscriber had any thing but uncurrent money to pay, is another matter. The commissioners might as well have received any thing else which an accommodating construction would call an equivalent for cash. But the statute did not allow a mere equivalent. It would not, for instance, have recognized a mortgage or stocks as a payment, of whatever value. The commissioners were here acting *ministerially*, and if they have not pursued the purposes of the statute, their acts cannot be sustained.

"I am therefore strongly inclined to the opinion that the check in question was void, as contrary to the policy of the statute. Nor can there be any doubt, I imagine, that the contemplated corporation, if I am right as to the facts, failed of going into existence, for want of the proper payments as a *condition precedent*. Such is the doctrine laid down by Chancellor Lansing, in *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Err. 94, 95, and recognized by this court in *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217; and see *Highland T. P. Co. v. McKean*, 11 Johns. 98, and *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238. These cases go farther. Each subscriber must pay as a condition to his own liability attaching. Payment was a requisite which the commissioners could not waive. *Starr v. Scott*, 8 Conn. 483.

"As to the *sixth* point; the *fraud* practised by one of the commissioners was, I think, properly treated by the judge as not vitiating the whole proceeding, if it had been otherwise regular. He deceived his co-commissioners, who took it upon them to distribute the stock. In this they acted *judicially*; and, had they been a quorum, their judgment would have been binding, notwithstanding the fraud. A judgment is sometimes void where it is got up collusively, and with a view to cheat a third person, who has no chance of being heard. It is then void in respect to that person, who may impeach it in a collateral suit; but it is never holden void as to a party who has legal notice and may be heard to contest it, even though the judges and party complaining may be defrauded either in respect to the form of proceeding or the merits. The party injured being before the court, must take his remedy there in the course of the suit. That a stranger may impeach a covinous or collusive judgment see *The Duchess of Kingston's case passim*, 11 St. Tr. 198, Hargr. ed., and especially p. 262. But that a party or privy shall not, see 1 Phil. Ev. 7th Lond. ed. 346; *Peck v. Woodbridge*, 3 Day, 30; and note (c) to *Doe, dem. Day v. Haddon*, 3 Dougl. 312, 313. Where, in a proceeding like that now in question, a quorum of commissioners assemble and the payments are regularly made, the board acquire jurisdiction, and the subscribers are to be considered as parties to the adjudication by which the stock is distributed.

"The objection that the check was misapplied, being turned out by Van Buren, may be true; but it would not vitiate it, if it was valid in its concoction, or if it became valid by the due organization of the company. In such an event, it could not be material to the defendant in what name the collection was enforced. He would obtain his stock and pay the stipulated compensation; and the directors would be accountable for the amount of the check, at least Van Buren

would be, if, as suggested, he was one of them. The point, however, does not appear to have been raised at the trial.

“But as the corporation do not appear to have been organized, there having been no *quorum* to distribute the stock; and, as the receiving of the uncurrent money and checks was in fraud of the statute, the check in question is void, both as wanting a consideration, and as an act which violated the policy of the law.”

HOW FAR CORPORATIONS MAY ACT IN OTHER STATES.

The Bank of Augusta v. Earle, 13 *Peters's Reports*, 519.

THIS is the leading case in America upon the subject of the power of corporations to act without the limits of the sovereignty creating them, and where the distinction between organic corporate action, and the act of an agent of the corporation, is thoroughly discussed and firmly established. The case was argued, at great length, by the ablest counsel in the country, and the decision has never been questioned. The arguments of such counsellors as Mr. David B. Ogden, John Sergeant, Daniel Webster, and others, would certainly require repetition here, if the question were still regarded as an open one. But as it is not, all that will be desired by the profession will be, the points determined, and the opinion of the court.

POINTS DECIDED.

A banking corporation, created by the laws of one state, may, through its agents, deal in exchange in another state; provided, there is nothing in the charter to restrict its action exclusively within the state where created.

But such corporation can do no organic corporate act beyond the limits of the state where created. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

By the comity of the American states, although, strictly speaking, they are foreign to each other, corporations created by one state may make valid contracts in another, and are competent to sue and to be sued in the courts of other states. This is in accordance with the law of all foreign states and the comity exercised towards each other.

Mr. Chief Justice *Taney* delivered the opinion of the court.

These three cases involve the same principles, and have been brought before us by writs of error, directed to the Circuit Court

and Southern District of Alabama. The two first have been fully argued by counsel ; and the last submitted to the court upon the arguments offered in the other two. There are some shades of difference in the facts as stated in the different records, but none that can affect the decision. We proceed therefore to express our opinion on the first case argued, which was the *Bank of Augusta v. Joseph B. Earle*. The judgment in this case must decide the others.

The questions presented to the court arise upon a case stated in the Circuit Court in the following words : —

“ The defendant defends this action upon the following facts, that are admitted by the plaintiffs : that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, &c. That the bill sued on was made and indorsed for the purpose of being discounted by Thomas M’Gran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia, by said plaintiffs, and payable in Mobile ; and the said M’Gran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs.

If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost ; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon.”

Upon this statement of facts the court gave judgment for the defendant ; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the state of Alabama ; and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money.

It will at once be seen that the questions brought here for decision are of a very grave character, and they have received from the court an attentive examination. A multitude of corporations for various purposes have been chartered by the several states ; a large

portion of certain branches of business has been transacted by incorporated companies; or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular state by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the states in which they are made, they cannot be enforced in the courts of justice.

Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation; and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended that a corporation composed of citizens of other states are entitled to the benefit of that provision in the Constitution of the United States which declares that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" that the court should look behind the act of incorporation, and see who are the members of it; and if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the state of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the state of Alabama: and as the citizens of Alabama may unquestionably purchase bills of exchange in that state, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the constitution or laws of the state. The case of the Bank of the United States *v.* Deveaux, 5 Cranch, 61, is relied on to support this position.

It is true, that in the case referred to, this court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision; and it has ever since been recognized as authority in this court. But the princi-

ple has never been extended any farther than it was carried in that case ; and has never been supposed to extend to contracts made by a corporation ; especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation ; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state ; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity ; of the artificial being created by the charter ; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state ; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another state ; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties.

The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court.

In the case of *Head and Amory v. The Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said, " Without ascribing to this body, which

in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it ; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

“To this source of its being, then, we must recur to ascertain its powers ; and to determine whether it can complete a contract by such communications as are in this record.”

In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, the same principle was again decided by the court. “A corporation,” said the court, “is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”

And in the case of *the Bank of the United States v. Dandridge*, 12 Wheat. 64, where the questions in relation to the powers of corporations and their mode of action, were very carefully considered ; the court said, “But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation ; corporations created by statute, must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself.”

It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter ; and those acts must also be done, by such officers or agents, and in such manner, as the charter authorizes. And if the law creating a corporation, does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.

The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange ; and, consequently, gives it the power to purchase foreign bills as well as inland ; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it pur-

chased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution. And also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra-territorial operation; and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmer's Bank of Delaware*, 12 Peters, 135. Now, natural persons through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the

capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside ; provided such contracts are permitted to be made by them by the laws of the place ?

The corporation must no doubt show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place ; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed ; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognized and executed in another, where the right of individuals is concerned. The cases of contracts made in a foreign country are familiar examples ; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made ; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered ; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong ; that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's *Conflict of laws*, 37, that " In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government ; unless they are re-

pugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts; since the case *Henriquez v. The Dutch West India Company*, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts, by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests

which bind them so closely together ; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states ? They are sovereign states ; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion ; that it has been decided in many of the state courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract ? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power ; why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty — where the last mentioned power does not come in conflict with the interest or

policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

We turn in the next place to the legislation of the states.

So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the state, unless restricted by statute. Thus a law was passed by the state of Pennsylvania, March 10, 1810, which prohibited foreigners and foreign corporations from making contracts of insurance against fire, and other losses mentioned in the law. In New York, also, a law was passed, March 18, 1814, which prohibited foreigners and foreign corporations from making in that state insurances against fire; and by another law, passed April 21, 1818, corporations chartered by other states are prohibited from keeping any office of deposit for the purpose of discounting promissory notes, or carrying on any kind of business which incorporated banks are authorized by law to carry on. The prohibition of certain specified contracts by corporations in these laws, is by necessary implication an admission that other contracts may be made by foreign corporations in Pennsylvania, and New York; and that no legislative permission is necessary to give them validity. And the language of these prohibitory acts most clearly indicates that the contracts forbidden by them might lawfully have been made before these laws were passed.

Maryland has gone still farther in recognizing this right. By a law passed in 1834, that state has prescribed the manner in which corporations not chartered by the state, "which shall transact or shall have transacted business" in the state, may be sued in its courts upon contracts made in the state. The law assumes in the clearest manner, that such contracts were valid, and provides a remedy by which to enforce them.

In the legislation of Congress, also, where the states and the people of the several states are all represented, we shall find proof

of the general understanding in the United States, that by the law of comity among the states, the corporations chartered by one were permitted to make contracts in the others. By the act of Congress of June 23, 1836 (4 Story's Laws, 2445), regulating the deposits of public money, the Secretary of the Treasury was authorized to make arrangements with some bank or banks, to establish an agency in the states and territories where there was no bank, or none that could be employed as a public depository, to receive and disburse the public money which might be directed to be there deposited. Now if the proposition be true that a corporation created by one state cannot make a valid contract in another, the contracts made through this agency in behalf of the bank, out of the state where the bank itself was chartered, would all be void, both as respected the contracts with the government and the individuals who dealt with it. How could such an agency, upon the principles now contended for, have performed any of the duties for which it was established?

But it cannot be necessary to pursue the argument further. We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well known, and long continued usages of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of Congress; all concur in proving the truth of this proposition.

But we have already said that this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favor of its adoption can no longer be made. And it remains to inquire, whether there is any thing in the constitution or laws of Alabama, from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy.

The constitution of Alabama contains the following provisions in relation to banks.

"One state bank may be established, with such number of branches as the General Assembly may from time to time deem expedient, provided that no branch bank shall be established, nor

bank charter renewed, under the authority of this state, without the concurrence of two-thirds of both houses of the General Assembly; and provided also that not more than one bank or branch bank shall be established, nor bank charter renewed, but in conformity to the following rules:—

“1. At least two-fifths of the capital stock shall be reserved for the state.

“2. A proportion of power in the direction of the bank, shall be reserved to the state, equal at least to its proportion of stock therein.

“3. The state and individual stockholders shall be liable respectively for the debts of the bank, in proportion to their stock holden therein.

“4. The remedy for collecting debts shall be reciprocal, for and against the bank.

“5. No bank shall commence operations until half of the capital stock subscribed for be actually paid in gold and silver; which amount shall, in no case, be less than one hundred thousand dollars.”

Now from these provisions in the constitution, it is evidently the policy of Alabama to restrict the power of the legislature in relation to bank charters, and to secure to the state a large portion of the profits of banking, in order to provide a public revenue; and also to make safe the debts which should be contracted by the banks. The meaning, too, in which that state used the word bank, in her constitution, is sufficiently plain from its subsequent legislation. All of the banks chartered by it, are authorized to receive deposits of money, to discount notes, to purchase bills of exchange, and to issue their own notes payable on demand to bearer. These are the usual powers conferred on the banking corporations in the different states of the Union; and when we are dealing with the business of banking in Alabama, we must undoubtedly attach to it the meaning in which it is used in the constitution and laws of the state. Upon so much of the policy of Alabama, therefore, in relation to banks as is disclosed by its constitution, and upon the meaning which that state attaches to the word bank, we can have no reasonable doubt. But before this court can undertake to say that the discount of the bill in question was illegal, many other inquiries must be made, and many other difficulties must be solved. Was it the policy of Alabama to exclude all competition with its own banks

by the corporations of other states? Did the state intend, by these provisions in its constitution, and these charters to its banks, to inhibit the circulation of the notes of other banks, the discount of notes, the loan of money, and the purchase of bills of exchange? Or did it design to go still further, and forbid the banking corporations of other states from making a contract of any kind within its territory? Did it mean to prohibit its own banks from keeping mutual accounts with the banks of other states, and from entering into any contract with them, express or implied? Or did she mean to give to her banks the power of contracting within the limits of the state with foreign corporations, and deny it to individual citizens? She may believe it to be the interest of her citizens to permit the competition of other banks in the circulation of notes, in the purchase and sale of bills of exchange, and in the loan of money. Or she may think it to be her interest to prevent the circulation of the notes of other banks; and to prohibit them from sending money there to be employed in the purchase of exchange, or making contracts of any other description.

The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out by a definite and distinct line the policy which Alabama has adopted in relation to this complex and intricate question of political economy? It is true that the state is the principal stockholder in her own banks. She has created seven; and in five of them the state owns the whole stock; and in the others two-fifths. This proves that the state is deeply interested in the successful operation of her banks, and it may be her policy to shut out all interference with them. In another view of the subject, however, she may believe it to be her policy to extend the utmost liberality to the banks of other states; in the expectation that it would produce a corresponding comity in other states towards the banks in which she is so much interested. In this respect it is a question chiefly of revenue, and of fiscal policy. How can this court, with no other aid than the general principles asserted in her constitution, and her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would without

doubt choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of the United States, from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state for this court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation.

If we proceed from the constitution and bank charters to other acts of legislation by the state, we find nothing that should lead us to a contrary conclusion. By an act of Assembly of the state, passed January 12, 1827, it was declared unlawful for any person, body corporate, company, or association, to issue any note for circulation as a bank-note, without the authority of law; and a fine was imposed upon any one offending against this statute. Now this act protected the privileges of her own banks, in relation to bank-notes only; and contains no prohibition against the purchase of bills of exchange, or against any other business by foreign banks, which might interfere with her own banking corporations. And if we were to form our opinion of the policy of Alabama from the provisions of this law, we should be bound to say that the legislature deemed it to be the interest and policy of the state not to protect its own banks from competition in the purchase of exchange, or in any thing but the issuing of notes for circulation. But this law was repealed by a subsequent law, passed in 1833, repealing all acts of Assembly not comprised in a digest then prepared and adopted by the legislature. The law of 1827 above mentioned was not contained in this digest, and was consequently repealed. It has been said at the bar, in the argument, that it was omitted from the digest by mistake, and was not intended to be repealed. But this court cannot act judicially upon such an assumption. We must take their laws and policy to be such as we find them in their statutes. And the only inference that we can draw from these two laws, is, that after having prohibited under a penalty any competition with their banks by the issue of notes for circulation, they changed their policy, and determined to leave the whole business of banking open to the rivalry of others. The other laws of the state, therefore, in addition to the constitution and charters, certainly would not authorize this court to say, that the purchase of bills by the corporations of another state was a violation of its policy.

The decisions of its judicial tribunals lead to the same result. It is true that in the case of *The State v. Stebbins*, 1 Stewart's Alabama Reports, 312, the court said that since the adoption of their constitution, banking in that state was to be regarded as a franchise. And this case has been much relied on by the defendant in error.

Now we are satisfied, from a careful examination of the case, that the word franchise was not used, and could not have been used, by the court in the broad sense imputed to it in the argument. For if banking includes the purchase of bills of exchange, and all banking is to be regarded as the exercise of a franchise, the decision of the court would amount to this—that no individual citizen of Alabama could purchase such a bill. For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state.

But it cannot be supposed that the constitution of Alabama intended to prohibit its merchants and traders from purchasing or selling bills of exchange; and to make it a monopoly in the hands of their banks. And it is evident that the court of Alabama, in the case of *The State v. Stebbins*, did not mean to assert such a principle. In the passage relied on they are speaking of a paper circulating currency, and asserting the right of the state to regulate and to limit it.

The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law; and it is very clear that at common law, the right of banking in all of its ramifications, belonged to individual citizens; and might be exercised by them at their pleasure. And the correctness of this principle is not questioned in the case of *The State v. Stebbins*. Undoubtedly, the sovereign authority may regulate and restrain this right: but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature, in relation to banking corporations; and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances;

and the prosecution against Stebbins was not founded on the provisions contained in the constitution, but was under the law of 1827 above mentioned, prohibiting the issuing of bank-notes. We are fully satisfied that the state never intended by its constitution to interfere with the right of purchasing or selling bills of exchange; and that the opinion of the court does not refer to transactions of that description, when it speaks of banking as a franchise.

The question then recurs—Does the policy of Alabama deny to the corporations of other states the ordinary comity between nations? or does it permit such a corporation to make those contracts which from their nature and subject-matter, are consistent with its policy, and are allowed to individuals? In making such contracts a corporation no doubt exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence is a franchise. Now it has been held in the court of Alabama itself, in 2 Stewart's Alabama Reports, 147, that the corporation of another state may sue in its courts; and the decision is put directly on the ground of national comity. The state, therefore, has not merely acquiesced by silence, but her judicial tribunals have declared the adoption of the law of international comity in the case of a suit. We have already shown that the comity of suit brings with it the comity of contract; and where the one is expressly adopted by its courts, the other must also be presumed according to the usages of nations, unless the contrary can be shown.

The cases cited from 7 Wend. 276, and from 2 Rand. 465, cannot influence the decision in the case before us. The decisions of these two state courts were founded upon the legislation of their respective states, which was sufficiently explicit to enable their judicial tribunals to pronounce judgment on their line of policy. But because two states have adopted a particular policy in relation to the banking corporations of other states, we cannot infer that the same rule prevails in all of the other states.

Each state must decide for itself. And it will be remembered, that it is not the state of Alabama which appears here to complain of an infraction of its policy. Neither the state, nor any of its constituted authorities, have interfered in this controversy. The objection is taken by persons who were parties to those contracts; and who participated in the transactions which are now alleged to have been in violation of the laws of the state.

It is but justice to all the parties concerned to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them that these engagements could not be enforced. Money was paid on them by one party, and received by the other. And when we see men dealing with one another openly in this manner, and making contracts to a large amount, we can hardly doubt as to what was the generally received opinion in Alabama at that time, in relation to the right of the plaintiffs to make such contracts. Every thing now urged as proof of her policy, was equally public and well known when these bills were negotiated. And when a court is called on to declare contracts thus made to be void upon the ground that they conflict with the policy of the state; the line of that policy should be very clear and distinct to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests; and it is not supported by any positive legislation. There is no law of the state which attempts to define the rights of foreign corporations.

We, however, do not mean to say that there are not many subjects upon which the policy of the several states is abundantly evident, from the nature of their institutions, and the general scope of their legislation; and which do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a state is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws; and to declare all contracts in the state repugnant to it, to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States, which a corporation might claim under peculiar circumstances, in a state other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us; and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained.

The judgment of the Circuit Court in these cases, must therefore be reversed with costs.

PRESUMPTIONS AGAINST CORPORATIONS ON THE GROUND OF ACQUIESCENCE, OR IMPLIED RATIFICATION.

Zabriskie v. Cleveland, Columbus, and Cincinnati Railw., 23 How. 381.

By the General Railway Law in Ohio, one railway company is allowed to aid in the construction of other lines, by subscriptions to the capital stock of the companies, provided that in a meeting of the stockholders, called for that purpose, two-thirds of the stock represented shall assent thereto. And by a subsequent act it was provided that any existing company might accept this provision; and by filing a certificate of such acceptance with the Secretary of State make it a part of its charter.

The defendants, without having complied with either of the foregoing conditions, made a guarantee of \$400,000, of the bonds of the Columbus, Piqua, and Indiana Railway.

This bill was brought by the plaintiff, a member of defendants' company, to restrain them from paying the interest on the bonds so guaranteed by them, upon the ground that the defendants' directors had exceeded their authority in making the guaranty. Some of the other stockholders by permission of the court below became defendants in the suit.

POINTS DECIDED.

The court held, that as between the parties to the present suit, the acceptance of the provisions of the general Railway Law and of the subsequent statute might be presumed from the conduct of the corporators, in not sooner taking steps to nullify the action of the directors in making the guaranty; and that it was not competent for the corporation, after having made such guaranty, received the benefits of it, and allowed the bonds to go into general circulation on the faith of its responsibility, now to repudiate them upon the ground of their own omission to comply with the requirements of the statute. And especially were the bonds binding upon the defendants since the guaranty by the directors had been expressly ratified by a resolution of the stockholders at a meeting held subsequently, and at this meeting the plaintiff's stock was represented.

The remaining facts important in the case, will sufficiently appear by the opinion of the court.

OPINION OF THE COURT BY MR. JUSTICE CAMPBELL.

The appellant is a stockholder of the Cleveland, Columbus, and Cincinnati Railway Company, a corporation existing by the law of Ohio, and empowered to construct a railway from Cleveland

south, and having a capital of more than \$4,300,000 distributed among above nine hundred stockholders. The appellant complains that this corporation, in April, 1854, illegally indorsed a guaranty upon four hundred bonds of one thousand dollars each, with interest coupons at the rate of seven per cent per annum, payable to Elias Fossett or bearer in New York, in 1869, that had been issued in that month by the Columbus, Piqua, and Indiana Railway Company, and which were also indorsed by the Bellefontaine and Indiana Railway Company, and the Indianapolis and Bellefontaine Railway Company, to the prejudice of the stockholders, and the burden of the resources of the said Cleveland corporation. The object of the bill was to obtain a decree to restrain the company, pending the suit, from paying the interest, and upon a declaration of the illegality of the bonds, to enjoin the corporation from applying any of its effects to their redemption.

The three defendants are holders of five of the bonds, who have availed themselves of the invitation of the bill to all their class to become defendants, and who assert that they are *bona fide* holders, and that their securities are valid obligations of the company. This issue of the obligations of these four corporations originated in a negotiation among their officers, in 1854, to determine upon a uniform gauge for all their roads, and to promote intimate connections in their transit operations.

The Piqua road and the Indianapolis road were projected to extend from Columbus to Indianapolis (one hundred and eighty-five miles), and were partially finished at a gauge of four feet eight and one-half inches, and had agreed to maintain this gauge for their common interest. At Columbus they were to connect with roads of the same gauge, leading through Ohio and Pennsylvania to Philadelphia.

The Cleveland and the Bellefontaine railways were constructed upon the Ohio gauge, of four feet ten inches, and the companies were interested to detach the other corporations from their Pennsylvania connection, and to combine them with their own and other companies, whose roads passed through Cleveland, along the shores of the lakes into New York, and connected there with the railway and canal communications of that state. The Piqua road was at this time finished only forty-six miles, and the company was embarrassed, and their work suspended for want of money. The Indianapolis company were willing to change the gauge of their

road to the Ohio pattern, but were withheld by their contract with the Piqua company. In January, 1854, the Piqua company appointed a committee from their board of directors to negotiate for money or securities sufficient to complete their road, and to discharge their debts, other than bond debts, and were authorized to prepare six hundred bonds of one thousand dollars each, of the usual form, to be secured by a mortgage, being the third mortgage of their franchises and road. They were also empowered to determine the gauge of the road, and either to maintain their existing connections, or to consent to the adoption of the Ohio gauge in conjunction with the Indianapolis company.

This committee opened their negotiations in Philadelphia, but pending these the vice-president of the company (Dennison) "sound-ed the inclinations" of the Cleveland company, by intimating that if that company would indorse a portion of the bonds, and take some of the stock of the Piqua company, the Pennsylvania connection would be abandoned. Some assurance having been given by the president of the Cleveland company to him, he, with the financial agent of the company (Niel) arranged a contract with the committee of the Piqua company to purchase the six hundred bonds, to guarantee a subscription for \$50,000 of their stock at par, and to assume the control of the settlement of all controversies and questions concerning the gauge of the road. These negotiations were pending from the first week in February until the 25th of the month, when the contract was reduced to writing, and the price to be paid settled at \$305,000. On the 7th of March, 1854, Dennison and Niel concluded a contract with the three corporations, Cleveland, Indianapolis, and Bellefontaine, by which they consented to the permanent adoption of the Ohio gauge for the Piqua and Indianapolis roads, and those corporations agreed to guarantee four hundred of the bonds of the Piqua company before mentioned, and to subscribe for thirty thousand dollars of their stock. This contract was reported shortly after to the boards of the several corporations, and approved, and the bonds were issued and indorsed, and the stock subscribed for in April, 1854. The tracks of the several roads were altered to conform to this arrangement shortly after. The negotiations and contracts of Dennison and Niel were for their own account and benefit. The testimony is conclusive of the fact that the members of the Piqua board were ignorant of the assurances they had received of the

disposition of the Cleveland and other companies to enter into such engagements. Dennison had been a director of this company from its organization ; but before signing the contract of the 25th February with the Piqua company, he exhibited a written resignation, and that resignation was entered upon the minutes of the board before the approval of the contract or the issue of the bonds to him and his associate.

This transaction was reported to the stockholders of the indorsing corporations in July, 1854, and accepted by them as the act of the company. The board of directors of the Cleveland company, on the 16th June, resolved, that there should be submitted to a vote of the stockholders, at a meeting on the 1st July proximo, four propositions for the aid of other roads desiring to form a connection with that company, under the 4th section of a statute of Ohio, passed 3d March, 1851. Among these was the indorsement of four hundred bonds of the Piqua company. Notice was given of this meeting by advertisement in the daily papers of Cleveland and Columbus, and a daily paper in New York, but it did not disclose the object of the meeting. Above eighteen thousand shares of stock were represented, and the following resolution was adopted without a dissenting vote.

Resolved, " That the indorsement jointly and severally with the Bellefontaine and Indiana Railway Company, and the Indianapolis and Bellefontaine Railway Company, of four hundred thousand dollars of the third mortgage bonds of the Columbus, Piqua, and Indianapolis Railway Company, by order of the board, March 6, 1854, be and the same is approved, adopted, and sanctioned, by this meeting, as the proper act of this company." But, although there was no dissent in the vote, there was dissatisfaction openly expressed by the proxy of the appellant, and of a majority of the stockholders represented at the meeting, and who declined to vote on the resolution. The bonds were offered for sale in the city of New York in the summer of 1854 and the spring of 1855, under an uncontradicted representation of their validity through the votes above mentioned, and were freely purchased at fair prices. The interest was paid by the Piqua company until October, 1855, when the instalment due in that month was discharged by the indorsers in equal proportions. In the spring of 1856, the Piqua company having become insolvent, the appellant served a notice upon the Cleveland company not to pay any portion of the princi-

pal and interest that might become due on the bonds, and required them to sue for the cancellation of their guaranty, and demanded his share of the profits of the company, without the reservation of any part for the payment of the bonds, and immediately after filed the bill in this cause.

He contends, that the sale by the Piqua company to Dennison and Niel is void, under a statute of Ohio that prohibits any director of a railway company to purchase, either directly or indirectly, any shares of the capital stock, or any of the bonds, notes, or other securities, of any railway company of which he may be a director, for less than the par value thereof; and it declares: "That all such stocks, bonds, and notes, or other securities, that may be purchased by any such directors for less than the par value thereof, shall be null and void."

He insists that the indorsement of the bonds of the Piqua company was of no advantage to the Cleveland company, but was merely to consummate the success of a speculation of Dennison and Niel,—a speculation reprobated by the law of Ohio; that the Cleveland company were not empowered by their charter to guarantee the contracts of corporations or individuals; that this indorsement was not required for the construction of the road, or in the course of the business of the company, or to promote an end of the incorporation; and that none of the acts of the General Assembly of Ohio authorize it.

He denies any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient, in the length of the time and in the failure to disclose the purpose of the call; that more than one-half of the stock of the company was not represented, and two-thirds of that present did not vote, for the want of proper information and counsel on the subject. That the meeting were ignorant of material facts; they were not advised of the relations of Dennison and Niel to the Piqua company, and their connection with the bonds, when the vote was taken; and were deceived as to the condition of the Piqua company. He avers that the bondholders are chargeable with notice of the fact that the indorsement was made before the meeting of the stockholders, and by the authority of the directors only.

The testimony does not convict the defendants—the bondholders—of complicity in the negotiations or contracts that preceded the issue of the bonds, nor does any equivocal circumstance

appear in their purchase of those securities. It is proved that it is a common practice for railway corporations to make similar arrangements to enlarge their connections and increase their business. The Cleveland company had encouraged this practice by precept and example. In a report of their board of directors, in January, 1854, the company were informed of their establishment of a line of first-class steamboats between Cleveland and Buffalo, and of their guaranty of the bonds of other companies for three hundred thousand dollars ; of subscriptions for stock to the extent of one hundred thousand dollars, and of promised aid to still another company. They say, " These companies may need additional assistance, and others proposing to intersect ours may, by a moderate loan of money or credit, be enabled to finish their roads, and establish with us business relations, for the mutual benefit of both parties, while the advances on our part may be made safe and remunerative. Unless advised of your disapprobation, the board will continue to pursue this policy."

No such disapprobation was expressed as to check the board of directors until the guaranty of these bonds had been sanctioned, in July, 1854, at a meeting of the stockholders. The discussion was confined to the circle of the corporation, until after the failure of the Piqua company to pay a second instalment of interest. Then the appellant filed this bill.

The frame of the bill implies that this contract exceeds the power of the corporation, and cannot be confirmed against a dissenting stockholder. His authority to file such a bill is supported upon this ground alone. *Dodge v. Wolsey*, 18 How. 331 ; *Mott v. Penn. Railw. Co.*, 30 Penn. 1 ; *Manderson v. Commercial Bank*, 28 Penn. 379.

The usual and more approved form of such a suit being that of one or more stockholders to sue in behalf of the others. *Bemon v. Rufford*, 1 Simon, N. S. 550 ; *Winch v. Birkenhead H. Railway Co.*, 5 De G. & S. 562 ; *Moseley v. Alston*, 1 Phil. 790 ; *Wood v. Draper*, 24 Barb. N. Y. R.

A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize.

The powers of the Cleveland company are vested in a board of

directors chosen from the company. They are authorized to construct and maintain their road, and for that purpose can employ the resources and credit of the company, and execute the requisite securities, and are required to exhibit annually a clear and distinct statement of their affairs to a meeting of the stockholders. In the year 1851, a general law relating to railway companies empowered them "at any time, by means of their subscription to the capital stock of any other company, or *otherwise*, to aid such company in the construction of its railway, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; . . . and empowered any two or more railway companies whose lines are so connected to enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: provided, that no such aid shall be furnished nor any . . . arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate; and the holders of at least two-thirds of the stock of such company represented at such meeting in person or by proxy, and voting thereat, shall have assented thereto."

This section was re-enacted in the following year, in a general act for "the creation and regulation of incorporated companies in Ohio," which last act provides that "any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that portion of their charters inconsistent with the provisions of this act shall be repealed." Curwen's Ohio Laws, 949, 1110.

It is contended, that neither of these acts was accepted by the Cleveland company; that the act of 1852 superseded that of 1851, and that the former could be accepted and become obligatory upon the company only in the mode it prescribed. Both of these are general acts, and were designed to enlarge the faculties of these corporations, so as to promote their utility, and to enable them to accomplish with more convenience the objects of their incorporation. This act of 1851 does not divest any estate of the company, or make such a radical change in their constitution as to authorize the members to say that its adoption without their consent is a dissolution of the body. But for an intimation in an opinion of the Supreme Court of Ohio (*Chapman & Harkness v. M. R. &*

L. E. Railw. Co., 6 Ohio, N. S. 119) to the contrary, we should have been inclined to adopt the conclusion that the act of March, 1851, might be operative without the specific or formal assent of the corporations to which it refers, and was not superseded by the act of 1852, as to pre-existing corporations. *Everhart v. P. & U. C. Railw. Co.*, 28 Penn. 340 ; *Gray v. Monongahela N. Co.*, 2 W. & S. 156 ; *Great W. Railw. Co. v. Rushant*, 5 De G. & S. 290.

The jurisprudence of Ohio is averse to the repeal of statutes by implication ; and in the instance of two affirmative statutes, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. *Cass v. Dillon*, 1 Ohio, N. S. 607.

The learned compiler of the laws of Ohio retains the act of 1851 as valid, in respect to the corporations then existing. But as between the parties on this record, the acceptance of those acts may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility, by asserting that they have not filed the evidence required by the statute to evince their decision. The observations of Lord St. Leonards in the House of Lords (*Bargate v. Shortridge*, 5 H. L. Ca. 297), in reference to the effect of the conduct of a board of directors as determining the liability of a corporation, are applicable to this corporation, under the facts of this case. "It does appear to me," he says, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. . . . The way, therefore, in which I propose to put it to your lordships, in point of law, is this : the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been engrafted upon the common law of Ohio. *Pearce v. M. & I. Railw. Co.*, 21 How. 441; *Strauss v. Eagle Ins. Co.*, 5 Ohio, N. S. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard.

The instances already cited of the course of dealing of this corporation, and others of a similar nature, of which there is evidence in the record, sufficiently attest that the corporation accepted the acts of 1851 and 1852 as valid grants of power; and it would be manifestly unjust to allow it to repudiate the contracts which it has made, because their acceptance of these grants has not been clothed in an authentic form. The Supreme Court of Ohio have recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and have denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved. *Chapman v. Mad River Railw. Co.*, 6 Ohio, N. S. 119; *The State v. Van Horne*, 7 Ohio, N. S. 327.

We conclude, that the validity of the contract of the Cleveland corporation, under the circumstances, must be determined on the assumption that it was authorized to exert the power conferred in the fourth section of the act of March, 1851, and 24th section of the act of May, 1852.

In deciding upon the validity of this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company the 25th February, 1854, when he signed the contract with the committee of the Piqua board of directors; or whether that contract was affected by its ratification by the board after his resignation was entered upon the minutes, or by the subsequent consummation of the contract, in the reciprocal transfer of the securities and payment of the consideration; or whether, as matter of law, the bonds of the Piqua company, commercial in their form, payable to another party, and issued after his resignation, are null and void.

The contract of the guarantors indorsing the bonds is a distinct contract, and may impose an obligation upon them independently of the Piqua company. In the absence of a personal incapacity of Dennison to deal with his principal, the issue of the bonds by the directors of the Piqua company is an ordinary act of administration; and bonds in such form, it is admitted, "challenge confidence wherever they go." We perceive no illegality in their delegation to them of the power to determine whether the Ohio or Pennsylvania gauge should be adopted, or their sale of the privilege to adjust the controversies and questions relating to it. Their adoption of the Ohio gauge was a solution of all the difficulties; it enabled the Indianapolis company to adopt it; it superinduced the resulting consequence of running connections among the four corporations; it secured profits to the guarantors; it imposed the burden of relaying their track upon the Piqua company. Their contract to adopt this gauge and to form the corresponding connections is a valuable consideration, and the Piqua company have fulfilled the engagements that Dennison and Niel were authorized to stipulate on their behalf. There is testimony that the bargain was a hard one for the guarantors, and argument that it was probably an unjust one, and possibly fraudulent in reference to the stockholders of the Cleveland company. But the bill is framed, not to obtain relief from error or fraud in the administration of the powers of the company by their trustees, but against the exercise of powers that did not belong to the corporation, and which the body could not confirm, except by a unanimous vote. *Foss v. Harbottle*, 2 How. 461; 2 Phil. Ch. 740.

We proceed to consider of the effect of the sanction given to the arrangements of the Cleveland company, through Dennison and Niel, with the Piqua company, by the vote of the meeting in July, 1854. It is objected that the notice of this meeting was insufficient, and that, unprepared as the corporators were, the proxy appointed by the non-resident stockholders was overpowered by the heat and passion of the directors and their adherents. There is some force in the complaint that this meeting was not conducted with a due respect for the social rights of a portion of the stockholders. But the time, place, and manner of the meeting were appointed by the directors, as the act of 1851 permits. The proxy of the appellant was there, exhibited his instructions, discussed the propositions submitted, and declined to vote, when his

vote would have controlled the action of the meeting. Since that time, several annual meetings have been held, at which the appellant was represented. The circumstances of the contract and its effects have been developed, and yet the resolution sanctioning this contract has not been rescinded. It may be that among the stockholders, and within the corporation, the cause of this procrastination and hesitancy to act upon the subject may be estimated properly. But we are to regard the conduct of the corporation from an external position. The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the meeting of the stockholders, and by their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. The opinion of the court is, that the injunction granted upon the bill of the appellant was improvidently granted, and that he is not entitled to the relief he has sought; and that the decree of the Circuit Court dissolving the injunction and dismissing the bill is correct, and must be affirmed.

The grounds of presumption of corporate acts in the case of corporations are extensively discussed by Mr. Justice Story in the case of *Bank of the United States v. Dandridge*, 12 Wheaton, 64. As a general rule, the same presumptions obtain in the case of corporations as of natural persons; and the whole subject is here elaborately reviewed by the learned judge, and the cases extensively referred to and commented upon. The question is discussed in almost every form in which it had arisen at the time. The distinction between the acts of corporations and of natural persons as grounds of presumption is here pointed out; and also that between corporations aggregate at common law and by statute, and how far the acts of corporations are required to be in writing. The distinction also between formalities on the part of corporations which are to be regarded as conditions precedent to the vesting of authority on their part to act and those which are merely directory, is here very lucidly illustrated. The pupil and the profession will find no case more instructive.

HOW FAR IT IS COMPETENT FOR A CORPORATION BY MEANS OF ITS OWN DISSOLUTION TO ESCAPE THE RESPONSIBILITY, OR AFFECT THE CONSTRUCTION OF ITS OWN OBLIGATIONS OR CONTRACTS.

Revere v. The Boston Copper Co., 15 Pick. 351.

THIS is an early and very leading case upon the questions involved. It was argued by a large number of very distinguished counsel. Mr. Webster, Mr. Phillips, and Mr. Robins, for the plaintiff; and Mr. Hubbard, Mr. Fletcher, and Mr. Aylwin for the defendants. The facts in the case will sufficiently appear in the opinion of the court, which was delivered by *Shaw*, Chief Justice, in which the following points were upheld:—

A corporation having made a contract with the plaintiff to serve its interests during his life, and promised in consideration thereof the payment of a fixed salary, so long as the service continued to be faithfully performed, cannot relieve itself from its responsibility by voting the dissolution of the corporation, transferring its property to trustees for the purpose of closing up its concerns, and giving notice to the executive authority of the state that it claims no further interest in its act of incorporation.

If this is attempted the plaintiff is thereby released from his obligation to serve the corporation, and is entitled to an indemnity for the loss which he has sustained in consequence of the refusal of the company to employ him and pay the stipulated salary.

OPINION OF THE COURT.

This case comes before the court upon an agreed statement of facts, and the question is, whether upon the case stated the plaintiff is entitled to recover.

The defendant corporation was established by the legislature, in February, 1825, and about a month after its incorporation, made the contract, on which the question arises.

That agreement was made on March 15, 1825, and the cause depends upon its construction. It purports to be a mutual agreement between the corporation on the one part, and the plaintiff and another individual on the other part.

It is contended by the defendants, that by the proceedings stated in the case, this corporation was dissolved and determined, and so by the limitation in the contract itself, the term for which the plaintiff was engaged had ceased.

Without determining whether such a voluntary dissolution of the corporation was the event contemplated by the parties in the

clause alluded to, we are of opinion, that by the acts disclosed, this corporation was not dissolved.

By a reference to the act of incorporation, St. 1824, c. 61, amended as to the name by St. 1825, c. 124, it appears, that the company was not incorporated for any determinate time, and was therefore, in its nature, perpetual. We think such a corporation cannot dissolve itself, and terminate its own existence, at its own will, by a bare notice to the executive department of the government.

It may be asked, then, what could have been contemplated by the clause in the contract, limiting the term of the plaintiff's engagement, to the time for which the corporation was established ; or how a corporation not limited in its duration can be dissolved and terminated. I suppose no reasonable doubt can exist, that the power to create, by the consent of parties, may, with the like consent, dissolve a corporation. An act of incorporation is deemed to be a contract, between its members and the sovereign, formed by the consent of both parties ; and it is conformable to the spirit of the law of contract, that, with the like consent, it may be abrogated and discharged, and therefore it would be competent for the legislature, by a formal act, to accept such a surrender, and thereupon dissolve the corporation. This would afford a security to the public and to all those who might have an interest in the concerns of such corporation, that no dissolution would be sanctioned by the legislature, which would in its consequences impair their rights.

But there is another circumstance which may be deemed sufficient to give a meaning and effect to this part of the agreement.

Although this act of incorporation had no provision limiting its duration to any certain time, yet it was made subject in all respects to the provisions of the general act regulating manufacturing corporations, St. 1808, c. 65, § 7, by which it is provided, that the legislature shall have power, at any time afterwards, to modify or wholly repeal any act of incorporation, thereafterwards to be made. This provision is therefore substantially embodied into the act of incorporation and made part of it. In consequence of this provision, the act was in effect held at the pleasure of the legislature, and had they passed an act, repealing it after a certain time, the period thus limited would determine the time for which it was incorporated, and fix a limit to the term of the plaintiff's engage-

ment. But as no such act was passed, and no act was done which in our opinion would dissolve the corporation, the time for which the plaintiff engaged, has not been limited or fixed by the clause in question. The question then recurs, upon the construction and legal effect of this contract.

The first and fundamental rule in the construction of a contract, is to ascertain the meaning and intent of the parties; and the second is, to look at every clause and word of the instrument in which they have embodied their contract, to ascertain that meaning.

The engagement of the plaintiff to perform services, being for the time for which the corporation was established, when applied to a corporation, constituted as already stated, is for an indefinite time, determinable by the dissolution of the corporation in a mode fixed by law. The stipulation of the corporation is, to pay the salaries to the plaintiff and the other individual, so long as they shall continue to perform their part of this agreement. This, without any further provision, must render the contract determinable by the death of the plaintiff, or by any failure to perform his part of the contract. But this is not left to inference. The next and last clause provides, that in case of the death or refusal to perform the agreement of the said Revere, or other individual, the corporation is to be discharged from all obligation except to the survivor or party continuing to perform. This clause, to my mind, carries a necessary implication, that until the death of the plaintiff or his refusal to perform his agreement, the corporation is not discharged, but the obligation to pay continues, and further, that upon the death or refusal to perform of one, the obligation of the corporation is to continue as to the other. This makes it essentially a contract with each, for life. For although this term is not used, yet a contract with a corporation, which is in its nature perpetual, but determinable by some contingent event, is a contract for an indefinite time, and a stipulation by the corporation to pay so long as the other party shall perform, with a proviso, that by the death of the party contracting to perform services, the corporation shall be discharged, is in legal effect a contract for life. Such, it appears to the court, was the contract in the present case.

In opposition to this view, it is contended, in the able argument for the defendants, that this could not have been the meaning and intent of the parties, because it would be unequal; in case of the ill success of the contemplated enterprise, injurious and ruinous

to the company; and as the obvious intent and expectation of the company, of whom the plaintiff was one, was to carry on a useful, and successful, and profitable business, the contract must be taken to have been made with the necessary limitation, that if the business proved unprofitable, the defendants must be at liberty to bring it to a close, that should terminate their obligation to employ and pay the plaintiff for services. They contend, that the parties contemplated, not the legal dissolution of the corporation, but the termination of its business existence, and this they had a right to determine, whenever they should find the enterprise unsuccessful, after a full and fair trial, and should in good faith for that cause judge it expedient to bring its business to a close.

These views would certainly deserve great consideration, and a more thorough investigation, if the terms of the contract were doubtful or ambiguous, and if it were open to construction. But if the terms of the contract are plain and perspicuous, it is not enough to say, that the parties could not have intended what their language has plainly expressed. The bargain may have been hasty or improvident, or one of which we cannot see the reasons or ground. Still, if such was the contract, and entered into fairly, it is not for a court of law to vary or alter it, or change its legal effect, upon vague notions of improvidence or inequality, or on account of its being founded upon expectations which have not been realized. But, although in the result it may have proved unprofitable to the corporation, the court cannot perceive that it was unequal as between the parties. It is to be presumed, that the plaintiff had skill and experience in his business, and was so considered by the company. They require him to stipulate, that he will devote the whole of his time, skill, and attention to their business for his life, and will engage in no other business. The court are not informed, what business the plaintiff and Blake were in before, what good-will or run of custom, or profitable concern, they gave up and in effect brought to the corporation by this agreement, or what offers or expectations they might have had from rival companies. Whatever they were, they were relinquished for ever by this contract. The corporation secured to themselves the exclusive benefit of the services of these individuals; and, although it may not have been beneficial to the corporation, it may have deprived the plaintiff and his associate of profitable engagements elsewhere.

One other ground of defence suggested, but I think not very

confidently urged, by the defendants' counsel, is, that the plaintiff himself was one of the corporation, and as such was bound by its acts; and that when a majority of the corporation voted to dissolve and wind up the business of the company, he was bound by it, though he individually dissented.

But we think it clear, that this argument cannot be sustained. So far as his rights, duties, and obligations as a *corporator* were concerned, no doubt he is bound by the acts of a majority, but no further. Here he claims, not as a corporator, but upon a contract, in which he is one party and the corporation the other. One of the main purposes and principal effects of incorporation is, to create a separate person in law, capable of acting and contracting in a separate capacity; and such conventional person and body politic has a legal existence, independent of that of all its members, and therefore may as well contract with one of its own members, as with other persons. It follows, as a necessary consequence, that such contracts must be construed and carried into effect in the same manner as contracts between other parties, and that the votes and acts of the corporation can have no effect to deprive the plaintiff of rights, which he claims, not as a corporator, but as a contractor with the corporation.

As the damages are not assessed, it may be proper to say a few words upon that subject. We consider the true effect of this agreement to be this, to employ the plaintiff and to pay him an annual salary during such employment; and the action is brought for a breach of that promise. The defendants have broken up their establishment, and given the plaintiff formal notice, that they have no further occasion for his services. This discharges the plaintiff from his obligation to serve them and to engage in no other business, and puts him in a condition to engage in any other employment at his pleasure. This being in violation of the defendants' contract with the plaintiff, to employ and pay him, gives him a claim for damages. The measure of his damages is an indemnity for the loss he has sustained by reason of not being thus employed and paid, and the damages are to be assessed on that principle.

The foregoing case is one of considerable importance, and the leading case upon the subject. The topics discussed have become more familiar to the profession since the time of this decision, but their intrinsic value and sacredness have been rather enhanced than diminished by the wonderful increase and exten-

sion of the agency of joint-stock corporate action in all the appliances of modern enterprise. The only possible security the public now holds for the faithful administration of by far the most numerous and valuable of commercial and business interests, in this country, is dependent solely upon holding up those corporate agencies to the strictest degree of responsibility for their faithful financial, and prompt and watchful, business administration. The entire carrying business of the whole country, both of persons and merchandise, is now in the hands of these corporate organizations. And we are compelled to believe, by the daily occurrences in the courts, in regard to a large proportion of them, that their control and management are largely in the hands of adventurers, whose sole aim is the attainment of wealth by the shortest lines and with no very scrupulous regard to the modes. Under these circumstances the doctrines maintained in the principal case will be acknowledged by all to be of the last importance. The question is very extensively discussed under another aspect, by Mr. Justice *Curtis*, of the United States Supreme Court, in *Curran v. The State of Arkansas*, 15 How. 304. The chief inquiry in this case was in regard to the right of a state, being the sole stockholder in a banking corporation, to appropriate the funds of the bank, by means of a state law, to any other purpose than the payment of its debts. It was considered that the creditors had acquired such vested interests in the funds of the corporation that a state law whereby they were deprived of payment out of such funds, must be regarded as a statute impairing the obligation of contracts, and so invalid, as conflicting with the provisions of the United States Constitution, in that respect.

THE NOTICE REQUIRED TO THE MEMBERS OF CORPORATIONS OF STATED, GENERAL, AND SPECIAL MEETINGS OF THE SHAREHOLDERS, AND HOW FAR THE BUSINESS TO BE TRANSACTED MUST BE EMBRACED IN SUCH NOTICE. ADJOURNMENT OF SUCH MEETINGS, AND PLACE OF HOLDING SAME. HOW FAR MEMBERS AFFECTED WITH NOTICE OF BUSINESS TRANSACTED AT LEGAL MEETINGS.

Warner v. Mower, 11 *Vermont Reports*, 385.

POINTS DECIDED.

Corporations have power to make general assignments for the benefit of creditors. If there is no restriction in the charter, or by-laws, all business of the corporation may be transacted at the annual, or any other stated meeting. In the absence of all provision in the charter and by-laws, every member of the corporation must be notified of all meetings. But if the charter or by-laws fix the time and place of the annual and other stated meetings of the corporation, no other notice is required. But other meetings which are special, must be notified according to the by-laws, or to every member, and the business to be done stated in the notice. How far the provisions of the charter and by-laws in regard to meetings are directory, and when indispensable to the validity of the business to be transacted.

THE opinion of the court was delivered by REDFIELD, J.

In this case the plaintiff claims title to the property, by assignment from the Green Mountain Manufacturing Company, and the defendants by virtue of an attachment against the same company. Both parties were *bona fide* creditors of the company, and the controversy is one of strict right. The deed of assignment is general, including all the property belonging to the company, and is made in the name of Henry Hodges, president of the company, and sealed with his private seal.

There can be no question, I apprehend, that corporations of this character, as well as natural persons, may assign their property for the benefit of creditors. And if they may do this, it follows, of course, that they may make such preferences, as any other debtors may. I shall, therefore, spend no time in speaking of the character of this assignment. If there is any well founded objection, in regard to its being so general, it must have been the evidence which results therefrom, that the preference was of a fraudulent character. This is a question of fact, with which we have no concern here. The county court decided the assignment informal and void. This must have been upon the ground, either that the president had no authority to make such assignment, or that the deed was not in proper form.

The form of the deed, at common law, would not, probably, be considered good. A conveyance under seal should be sealed with the seal of the person or persons contracting, and not of the agent. *Wilks v. Back*, 2 East, 142. The case cited in argument from the 1 Ohio Reports is to the same effect. In the absence of any statutory provision upon the subject, I should myself incline to the opinion, that the president or agent, making a conveyance under seal on the behalf of a corporation, should affix the seal of the corporation. But the statute of this state expressly directs a conveyance in the present form. 1 Comp. Laws, 160, § 3. "The deed of such president, reciting the vote of the corporation, shall be sufficient to vest a title in the purchaser." Here it is expressly provided that real estate of corporations of this character may be conveyed by the *deed of the president*. And so far as the personal estate is concerned, the conveyance was sufficient without the seal, either of the president or corporation. So that the *form* of the conveyance would seem to be quite sufficient.

The authority of the president to make such conveyance depends

altogether upon the vote of the corporation, at their annual meeting in the year 1837, held by adjournment from the day fixed by the by-laws. It is too well settled to require comment, that all corporations, whether municipal or private, may transact any business at an adjourned meeting, which they could have done at the original meeting. It is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it is evident it must be considered the same meeting, without any loss or accumulation of powers. *Schoff v. Bloomfield*, 8 Vt. 472.

It is to be borne in mind, too, that a manifest distinction obtains between general stated meetings of a corporation, and special meetings. I know that stated meetings may nevertheless be special; *i. e.*, limited to particular business. But stated meetings of a corporation, are usually general; *i. e.*, for the transaction of all business within the corporate powers. Unless the object of such meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted at such meeting, unless special notice was given. Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting, or of the business to be transacted. *Angell & Ames on Corporations*, 275. Such is the general law of private corporations.

But as all corporations are entities of the law merely, and exist and act solely in conformity to their charter and by-laws, it is obvious that the force and effect of every act of any particular corporation must depend mainly upon the charter and by-laws of that corporation. These are denominated the constitution and laws of the corporation, and, like every other constitution and all other laws, should receive such construction, as to effect the probable intention of the framers. That intention must be judged of as in other cases, by the words used in reference to the subject-matter and circumstances of each particular corporation.

The charter of this corporation provides for the first meeting of the corporation specially, and that at that meeting, and at all other meetings legally notified, they may make and alter such by-laws, as

may be thought necessary. There being thus no restriction in the charter, in relation to meetings of the corporation, or the business to be transacted, that subject will be governed exclusively by the by-laws.

Those by-laws provide for an annual meeting of the corporation, to be holden at their counting-room, on the first Wednesday in April, of each year. Thus far the time and place of the meeting is fixed, and there being no restriction in regard to business, any and all business pertaining to the interest and powers of the corporation, may be transacted. The annual meeting, of all others, is the one when, not only usually, but always, *all* business is expected to be transacted. And the common custom of a country is of great force in the construction of statutes, as well as contracts.

But it is undoubtedly competent for the corporation to restrict the business to be done, and it is said this corporation have done so.

After the main body of the article, as above recited, is added "at which (meeting) the officers of said company shall be chosen by ballot." This clause, it is said, defines the business to be transacted, and nothing else can legally be done. If the meeting were special, this might be a fair construction. If a special meeting is called for a particular purpose, the corporators have a right to expect that nothing else could or would be done beyond the specified object. But not so, in regard to the annual meeting. This meeting is intended for general business. It would be monstrous and almost ludicrous to suppose, that any corporation would limit the business of the annual meeting to the mere choice of officers. And it is evident such was not the intention of this corporation. They have provided that the officers shall be chosen at this meeting and in a particular mode, and left the object of the meeting general in other respects.

But there is no doubt, that a corporation might provide that even stated meetings should be warned in a particular manner, and that unless they were so warned, no business could be transacted. This, in regard to special meetings, is done in the present case, and I have no doubt, as such special meetings rest solely upon the notice given, for their authority, that the notice must be such as is required by the by-laws, or the meetings would be wholly without authority, and all business attempted to be then done, would

be of no binding force upon the corporation. For the minority, if any, whether present or absent, could not be bound, except in obedience to the by-laws. For in that mode, and that only, have they consented to be bound. Every member is entitled to notice of special meetings unless the by-laws excuse it. *Kynaston v. Mayor of Shrewsbury*, 2 Strange, 1051. *King v. Theodorick*, 8 East, 543. *King v. City of Carlisle*, 1 Strange, 385. *The King v. Doncaster*, 2 Burrows, 723, 728. *Stow v. Wyse*, 7 Conn. 214.

But where the time and place and the object of the meeting are each fixed by corporate statutes, no further notice would seem to be required. In regard to special meetings it is required, and would seem to be indispensable, to their existence. It is true that the phraseology is general "*all meetings*" of the company shall be notified by the clerk in writing, &c., ten days previous to the time appointed, stating the general object of the meeting.

1. This clause is a portion of the article in relation to special meetings.

2. From the nature and character of its provisions, it could have reference only to special meetings. For why should the annual meeting, whose time and place and object were all fixed by the by-laws, be notified in this manner. It would seem to be purely a work of supererogation.

3. If we admit that the corporation intended to make this regulation in regard to stated meetings, and the annual meeting in particular, lest they should escape the memory, we still do not get rid of the absurdity to which the construction leads us. There was but one stated meeting of this corporation, and that the annual meeting. The time and place being fixed, the object universal, one would almost as soon forget the existence of the corporation as the annual meeting, and its object.

But if such a provision in the statutes of the corporation, in relation to the annual meeting, had been found in express terms, it should still receive the same construction which similar provisions do in legislative statutes. When the statute is merely directory, — *i. e.* directs the manner of doing a thing, and is not of the essence of the authority for doing it, — a compliance with its requisitions is never considered essential to the validity of the proceeding, unless such is the expressed or evident intention of, the legislature.

And in the present case, where, at most, the company have pro-

vided that the annual meeting shall be notified by the clerk, in a particular manner, and this as a mere remembrancer to the stockholders, it could hardly be supposed the company could have intended the meeting should fail for any defect in, or even want of notice.

But if we concede that the notice required was intended to apply as well to the annual as to special meetings, and that without such notice in all its essential requirements, the meeting must fail ; still, it is evident that, in this case, the notice was sufficient.

The clerk here served a notice, in the manner required by the by-laws, upon each corporator in due time, stating the time and place of the meeting and that it was the annual meeting of the company. This was certainly all the notice which could be given of the annual meeting. As each corporator knew, that it was competent at this meeting to transact all business pertaining to the corporate interests, the very term, annual meeting, was, *ex vi termini*, notice to that effect ; and it could have answered no good purpose to repeat this in the notice. So that, in whatever light this case is viewed, it is evident the testimony which was rejected by the county court, viz., the vote and proceedings of this meeting, should have been received. Their judgment must, therefore, be reversed, and the case remanded for a new trial.

Collamer, J. dissenting.

In the case of *Wiggin v. Freewill Baptist Church in Lowell*, 8 Met. 301, 308, the same general question is very carefully examined by *Hubbard, J.*, and the following proposition declared : that where the by-laws of a religious society incorporated under the general laws of the state, are silent as to the manner of calling meetings of the corporation, they must be called in conformity with the general provisions of the statute upon the subject, and in the absence of all provision upon the subject, either by the general laws of the state or the by-laws of the corporation, meetings could only be called by giving personal notice to every member of the company ; and unless so called, the business transacted would not be valid or binding upon the corporation. The same proposition is maintained by the court in *Stow v. Wyse*, 7 Conn. 214, 218, in a very able opinion by *Daggett, J.* And there can be no room to question that such is the settled rule of the English common law, as stated in *Warner v. Mower*, *supra*.

In *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274, it is decided by the court, that every reasonable intendment is to be made in favor of the regularity of the proceedings of a private corporation in their corporate acts. And where it appeared that the by-laws of the corporation required the corporate meetings to be held at the counting-room of the company, and the records showed that the meeting was held at the dwelling-house of the general agent and clerk, without

stating that it was the counting-room of the corporation, and there was no other evidence upon the point, it was held that the court would presume that this place was, for the time being, the counting-room of the corporation, as it was not improbable their counting-room might be held permanently at the dwelling of their general agent.

And in *The People v. Batchelor*, 22 N. Y. 128, it was decided that all the members of a corporate body are presumed to have notice of the time of holding its stated meetings, and are bound by the proceedings at such meetings; but there is no presumption that they know what is done at such meetings, so as to charge them with notice of the same, especially where it contemplated future action at some time different from that of the stated meetings of the company. But such members will be affected with notice of an adjourned meeting merely in continuation of the regular meeting, and for the purpose of completing the business of that meeting.

THE DISTINCTION BETWEEN THE ORDINARY FRANCHISES OF CORPORATIONS WHICH, TO A CERTAIN EXTENT, THEY MAY EXERCISE IN FOREIGN JURISDICTIONS, AND THOSE OF A PREROGATIVE CHARACTER, WHICH THEY CAN ONLY EXERCISE IN THAT OF THEIR CREATION.

State of Vermont v. Boston, Concord, and Montreal Railroad, 25 Vermont Reports, 433, 441.

The distinction between the ordinary corporate franchises and those of a prerogative character pointed out.

Foreign corporations may, to a certain extent, exercise the former in this state, but not the latter.

The application of the rule to different states of facts considered.

THIS was an information filed by the prosecuting officer of the state, on its behalf, against the defendants, a railway corporation in the State of New Hampshire, alleging a usurpation on the part of the defendants, of the exercise of their corporate functions within the State of Vermont, in a manner inconsistent with the sovereignty of the state, and claiming process against the defendants in the nature of a writ of *quo warranto*.

The facts important to be stated here were that the defendants' line came to the line of the State of Vermont, at Wells River, in the town of Newbury, in that State, to which point the Connecticut and Passumpsic Rivers Railway extended in the State of Vermont. And by the laws of the State of Vermont any railway in the state is allowed to form a connection with a railway in any adjoining state, at the line of the state.

The other facts will sufficiently appear in the opinion of the court delivered by —

REDFIELD, Ch. J. But it seems to the court, that this whole subject of the right of aliens to hold land in this state, has but a remote analogy to the usurpations which it is claimed this foreign corporation has perpetrated upon the sovereignty of the state. The right of this court to issue the writ of *quo warranto*, is recognized, in general terms, by our statutes. The occasions are left to be determined by the common-law rules. And, by those rules, it is apparent the writ is the appropriate mode in which to try any alleged usurpation of offices, or franchises, inconsistent with the state sovereignty. And that seems to be the purpose of this proceeding.

The allegations in the information are not, that certain persons, without being incorporated, usurp and claim to exercise corporate functions, which is no doubt good ground for filing such information; but, “that there is existing, and doing business in the State of New Hampshire, a corporation, established, constituted, and chartered by the laws of said state, by the name,” &c., “and that said corporation, without any grant from this state, erected a railroad bridge across Connecticut River, extending its stone abutments into Newbury, in this state, about ten rods, and ever since have occupied and used the same, and claim the right and franchise of so doing.” It is further claimed and charged, that this New Hampshire railroad, has purchased, in this state, two pieces of land, between the Connecticut River and the Passumpsic Railroad, and the fee of another piece, across which the Passumpsic Railroad have already laid their branch road to Connecticut River; and the gravamen of the charge seems to be, “That the Boston, Concord, and Montreal Railroad claim to hold said land in fee simple, as the absolute owners thereof; which right of taking, holding, possessing, and enjoying the said land and railroad bridge, is a usurpation upon the State of Vermont.”

This case having gone to proof, it appears that the Boston, Concord, and Montreal Railroad, a corporation extending by its charter to the line of this state at Wells River (and two Vermont railroads, by express statute of the state, having permission to unite with that road, or any other New Hampshire road at this point), have erected a railroad bridge across Connecticut River, and purchased some fifteen acres of land adjoining the terminus of their road at the line of this state, which land will be convenient for the use of

the company, in doing business at the line of the state, if they should not unite with any Vermont road, and almost indispensable if they do so unite. There is no evidence that this corporation have run their cars into this state, or that they purpose to do so, unless they effect an arrangement for a junction with one or more of the Vermont roads; but there is every reason to believe they have no such purpose.

By their charter, it is admitted, this corporation have permission to hold real estate, for the accommodation of their business, greatly exceeding what they now hold. The question then is, whether the having purchased and taken a conveyance of this land, in this state, is to be regarded as any usurpation upon the sovereignty of the state? And it seems to us very obvious, that they have committed no such usurpation, that they have assumed no franchises which are strictly of a prerogative character. By that I mean, such acts as neither natural or artificial persons can exercise without special grant of the legislature. All the functions of a corporation are, in one sense, franchises. The right to hold property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others, perhaps, are franchises, which constitute the very definition of a corporation. And whenever and wherever the corporation is recognized, for any purpose, the existence and exercise of these franchises must also be recognized. But the right to build and run a railroad, and take tolls, or fares, is a franchise of the prerogative character, which no person can legally exercise, without some special grant of the legislature. And we should not, of course, be expected to suffer a foreign railroad to usurp the exercise of any franchises of this character. This distinction exists in regard to some other classes of corporations. It is only the issuing of notes to be the representative of specie, and to form a portion of the currency, and the other local operations of banking—making discounts and receiving deposits, and the like—which are of a prerogative character. But there are many other franchises of foreign banks, and other business corporations, of which it is of daily occurrence to allow the exercise, in every state in the Union. They are allowed to sue and collect their debts, to levy their executions upon land, and take land in payment of debts, when mortgaged, or otherwise. And of all this, no doubt is entertained. Mr. Justice McKinley was the only judge who ever had the bold-

ness to hold the contrary, and his decision was speedily reversed by the Supreme Court. *Bank of Augusta v. Earle*, 13 Pet. 519, 588.

This point is expressly decided in the State of New Hampshire, in the case of *Lumbard v. Aldrich* (8 N. H. 31), where it is held that "A corporation, created by the laws of another state, has power to take and hold lands, in this state." *Parker, J.*, says, "If they may sue, they may satisfy their judgment, by levy upon lands; and of course hold the land, and convey it. And if they can do this, they may take title by deed, in satisfaction of a debt, by agreement, or upon any other consideration." The same point is decided in *The Silver Lake Bank v. North* (4 Johns. Ch. 370), and in most of the American States. Our own reports are filled with cases in favor of, and against, foreign corporations. *Day v. The Essex County Bank* (13 Vt. 97); *Grafton Bank v. Doe* (19 id. 463); *Claremont Bank v. Wood* (10 id. 582); *North Bank v. Wood* (10 id. 194); occur to me, at the moment, and there are doubtless twenty other cases of the kind. All the chartered bridge companies across Connecticut River are of course incorporations, in most cases the charters having been granted by the legislature of New Hampshire; and it was shown to us, in the trial of this cause, that in very few instances has any grant been obtained from this state. But these bridges, like the railroad bridge in question, must rest at their western termini upon the soil of this state. And all this has been acquiesced in, for fifty years and more. This will not indeed settle the rights of this railroad corporation, by prescription, as their own existence is of a more recent date. But it goes very far, in my apprehension, towards settling the law of the state, in regard to road and bridge corporations in the states conterminous with this state; and especially when corporations have been created in this state, with express permission to unite with this railroad, or any other New Hampshire road at this point, should I regard it as decisive of the right of the New Hampshire corporation to build their road to the very line of the state, if they could obtain the land for that purpose, without coercive measures. They could not, perhaps, compel the land-owners to yield them the right of way, or even space to sustain the western abutment of their bridge, without a grant from the legislature, of the prerogative power to exercise the right of eminent domain over lands in this state.

But, having obtained the permission of the land-owners, I

should not regard the bringing of their road to the very limits of this state, under the circumstances, as any infringement of the sovereignty of the state, or as any exercise of a prerogative franchise. It is the settled law of England, in regard to aliens even, that if they purchase land by royal license, they may hold it. And in the present case, we could scarcely regard the permission given the Vermont roads by their acts of incorporation, or acts amendatory of such acts, to unite with this or any other New Hampshire roads at the line of the state, at this point, as any thing less than an implied permission to the New Hampshire roads to build their superstructure to the very line of the state. And as this line, at this point, is the "westernmost bank of the Connecticut River," the bridge must, of course, in order to bring the rails to the line of the state, rest more or less upon Vermont soil. Allowing them then no prerogative right to eminent domain in the soil, we cannot regard the long practice of bridge companies across the Connecticut River, the actual license of the legislature, and the reason of the case, as justifying any interference with their quiet possession of the land, for the purpose of erecting a bridge, by permission of the owners of the fee of the land, or by means of obtaining the fee in themselves.

The obtaining the fee of some fifteen acres of land in the vicinity of the abutment of this bridge, by the respondents, would doubtless have been regarded as a very harmless operation, by the state sovereignty, and would scarcely have attracted much public notice, had it not been for the rival interests of the Vermont railroads. And it was certainly not improper for them to assert any exclusive claims which they might have, or might suppose they had, in any counter movements made by others. But if the Passumpsic Railroad should unite with the New Hampshire roads at this point (and as both roads are already in operation to this point, there is nothing to hinder such a union), and especially if the Montpelier road should be ultimately built to this point, thus bringing two New Hampshire and two Vermont roads to a junction, it is not suggested that in such an event, this land would not be useful for the accommodation of the probable prospective business of all these roads at this point. And as it seems probable that in the event of such a junction, the erections to accommodate the business must probably be upon the Vermont side, to a considerable extent certainly, it is thus made highly desirable to secure this land, no

doubt. And as the New Hampshire roads have a common interest in the matter, we cannot comprehend why they should not have a common right to take early measures to secure the means of their joint accommodation. We certainly should not feel bound to interfere, to hinder any thing which they have thus far attempted.

We take it for granted, from what has been already said, that the respondents are, at present, regarded as holding most, if not all, of this fifteen acres, certainly beyond what is indispensable to the accommodation of their legitimate business at the line of the state, as any other proprietor holds land in the state, subject to the public reserved right of eminent domain. And beyond the actual present necessities of the respondents, if the Vermont roads require any portion of the land held by the respondents, for the necessary accommodation of their own business, they may still take an easement in this land, for such purposes, the same as if it were held by any other proprietor.

It is considered, therefore, that the prosecutor has shown no case requiring the exercise, by this court, of the writ of *quo warranto*, and the information is dismissed. And as the proceedings have been in the name of the state, no costs can be awarded.

EXPULSION FROM THE COMPANY'S CARS.

O'Brien v. Boston & Worcester Railroad Company et al., 15 *Gray's Reports*, 20.

A railway company has the right to eject a passenger from its cars for non-payment of his fare, according to the regulations of the company, or on a reasonable demand being made therefor.

Nor can he again enter the same train, and require the company to transport him upon tender of his fare.

The company having the right by law to establish all needful and proper regulations concerning passengers who refuse to pay their fare, may prove such regulations as part of their justification.

THE plaintiff entered the cars of the defendants' company at Boston, intending to go to Cordaville, and having a ticket from Brighton, an intermediate station, to Cordaville, but no ticket from Boston to Brighton. Before reaching Brighton the plaintiff handed the conductor his ticket, and payment of the fare from Boston to Brighton was demanded. Upon the plaintiff's refusal

to pay it, the cars were stopped, and he was put off the train. He immediately went to the rear of the train and got upon it, and the conductor being informed thereof, at once went to the rear car, and although the plaintiff offered to pay whatever fare the conductor should demand, the conductor refused to receive it, and stopped the cars and forcibly ejected the plaintiff a second time. For this the plaintiff brought tort against the railway company and the conductor.

OPINION.

BIGELOW, J. The correctness of the instructions given to the jury in this case, can be readily ascertained by considering the nature of the contract entered into between the plaintiff and the defendants, and the respective rights and duties of the parties under it. On entering the cars of the defendants at Boston, the plaintiff had a right to be carried thence to his place of destination in that train on paying the usual rate of fare. This fare he was bound to pay, according to the regulations of the company, or on a reasonable demand being made therefor; if he failed to do so, then his rights under the contract ceased; he had forfeited them by his own act; and having himself first broken the contract, he could not insist on its fulfilment by the defendants. This is the rule of common law. It is also expressly enacted in St. 1849, c. 191, § 2, that no person, who shall not upon demand first pay the established toll or fare, shall be entitled to be transported over a railroad. The defendants, therefore, were not bound to transport him farther, but were justified in ejecting him from the cars by the use of all lawful and proper means. Angell on Carriers, §§ 525, 609; Redfield on Railways, 26, 261; *Stephen v. Smith*, 29 Vt. 160. Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay the fare after his ejection. They were not bound to accept performance after a breach. The right to demand the complete execution of the contract by the defendants, was defeated by the refusal of the plaintiff to do that which was either a condition precedent, or a concurrent consideration on his part, and the non-performance of which absolved the defendants of all obligation to fulfil the contract. After being rightfully expelled from the train, he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. The right to refuse to

transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party, who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfilment of the original contract by the defendants. Besides, the defendants are not bound to receive passengers at any part of their route, but only at the regular stations or appointed places on the line of the road, established by them at reasonable distances for the proper accommodation of the public. Angell on Carriers, § 527 a; *Murch v. Concord Railroad*, 9 Fost. 39. The plaintiff had, therefore, no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; *a fortiori* the plaintiff could not. It follows that, on the facts stated in the exceptions, the plaintiff proved no just claim for damages against the defendants, and the instructions given to the jury, under which the verdict was rendered, were clearly erroneous.

The court also erred in rejecting the evidence of the regulations established by the defendants concerning passengers who refused to pay their fare. The right to establish all needful and proper regulations is vested in the defendants by law. Rev. Sts. c. 39, § 83; *Commonwealth v. Power*, 7 Met. 602. And they should have been permitted to prove them as part of their justification.

Upon the subject of the right of a railway company to exclude persons from its grounds or cars, *Commonwealth v. Power*, 7 Met. 596, is a leading case; but the opinion of *Shaw*, C. J., is so fully cited, *ante*, vol. i. p. 95, that it is will be unnecessary to repeat it here. In that case, the court say the authority to make reasonable and suitable regulations in regard to passengers intending to pass and repass on the company's road, in the passenger cars, and in regard to all other persons making use of the houses and buildings connected with the railway, is incident to such ownership and their employment as passenger carriers; and all such regulations will be deemed reasonable, which are suitable to enable them to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers. And the regulations need not be made in the form of by-laws, to be carried into effect by penalties and prosecutions. "Such by-laws are rather the regulations which a corporation has power to make in respect to the government of its own members, and its corporate officers, or of municipal corporations that exercise, to a limited extent, the powers of government. But the regulations in question are such as an individual who should happen to be the sole owner of the depots and buildings, and of the rail-

way cars, would have power to make, in virtue of his ownership of the estate, and of his employment as a carrier of passengers." To the same effect also is *State v. Overton*, 4 Zab. 441 *infra*. The same general doctrine is maintained in *Stephen v. Smith*, 29 Vt. 160, where the court say that the safety and security of the travelling public, as well as the interest of the railway itself, require that the right and duty to establish and enforce reasonable regulations for the government of the line, exist and be enforced. And upon that ground it has been held, that the railway company and their servants may not only exclude from their cars those who refuse to pay their fare, or to comply with such reasonable regulations as are made for their government, but they may also rightfully inquire into the habits or motives of those who claim the right of passage: citing *Jenks v. Coleman*, 2 Sumner, 221, and *Commonwealth v. Power*, *supra*. The court also say the discrimination in fare which the railway company made in that case when tickets were purchased at the several stations, or when paid to the conductor in the cars, which was five cents, is reasonable, as affording proper checks upon its accounting officers, and which they have a right to enforce. While the law requires of the company the adoption of such regulations as are necessary for the safety and convenience of passengers in their trains, they have also the right to adopt such reasonable regulations as are necessary for their own security; and those regulations are to be mutually observed. If they are not complied with by passengers, the company may not only refuse them admission within the cars, but if they are within they may remove them. In this case, however, a statute of Vermont permitted the company to remove a passenger from the cars only at one of their stations. See also to the same point, *State v. Overton*, 4 Zab. 434, *infra*.

REQUIRING PASSENGERS TO GO THROUGH ON THE SAME TRAIN.

State v. Overton, 4 Zabriskie 435.

By paying for a ticket and procuring a passage from one point to another on a railway, the passenger acquires a right to be carried directly from one point to the other without interruption, but not the right to leave the train and resume his seat in another train, at any intervening point on the road.

The validity of the by-law of a corporation is purely a question of law. Per *Green*, C. J. Regulations by common carriers of passengers touching the comfort and convenience of travellers, or prescribing rules for their conduct to secure the just rights of the company are unlawful when unreasonable, and because unreasonable, and the reasonableness or unreasonableness is a question for the jury under proper instructions.

OPINION.

GREEN, C. J. THE defendant was convicted in the Oyer and Terminer of Morris, of an assault and battery upon Theodore A. Canfield. A motion having been made for a new trial, upon the

ground that the charge of the court was erroneous, and that the verdict was against law and contrary to the evidence, the question was reserved and submitted to this court for its advisory opinion.

The material facts are, that on the 18th of March, 1853, Canfield, the prosecutor, procured at the office of the Morris and Essex Railway Co., in Newark, a passenger's ticket to Morristown. He paid for the ticket the regular fare from Newark to Morristown, and took his seat in the cars. At Millville, one of the way-stations upon the road, he left the train. Before leaving the cars, he received from Van Pelt, the conductor of that train, a conductor's check, upon which was printed the words, "Conductor's check to Morristown." About an hour afterwards, Canfield took the next train of cars which passed the Millville station for Morristown, of which train Overton, the defendant, was conductor. Upon being asked by the conductor for his fare, Canfield tendered in payment the check received by him from Van Pelt, the conductor of the train in which Canfield had first taken his seat: this the conductor refused to accept, and the passenger refusing to pay his fare and declining to leave the cars upon request, he was, without unnecessary force or violence, and without personal injury, removed by the defendant from the cars at one of the way-stations upon the road before reaching Morristown. The company furnished, at the office in Newark, through tickets to Morristown, and also tickets to Millville and other way-stations upon the route. The cost of a ticket directly from Newark to Morristown was less than the cost of a ticket to Millville and another ticket thence to Morristown. Some years previous to the transaction, the company had given public notice that conductors' checks were not transferable from one train to another.

It was not questioned upon the trial that a railway company are not bound to carry a passenger, unless upon payment or tender of his fare; that they may, in such case, either refuse to permit him to enter the cars, or having entered them, they may require him to leave them before the termination of the journey; and that if he refuses to leave, they may remove him at a suitable time and place, using no unnecessary force. The ground upon which the conviction was asked was, that in fact the passenger had paid his fare; that he offered the conductor competent and satisfactory evidence of that fact, and that, consequently, the act of the conductor in removing him from the cars was illegal.

Had the passenger in fact paid his fare, or was the check given by the conductor of another train, evidence of that fact? He had, it is admitted, paid his fare to Morristown, by the train in which he originally took his passage. Did that authorize him to leave the train at any point upon the road, and to resume his place for his original destination, in a different train, at his pleasure?

The question is obviously a question of contract between the passenger and the company. By paying for a passage, and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other, without interruption. He acquired no right to be transported from one point to another upon the route, at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over the entire route for a stipulated price. But it was no part of the contract that they would suffer him to leave the train and to resume his seat in another train, at an intervening point upon the road. Their contract with the passenger would have been executed, if they had proceeded directly to Morristown, without stopping at any intervening point; nor could he have complained of a violation of contract, if no other train had passed over the road, in which he might have completed his journey. If the passenger chose voluntarily to leave the train before reaching his destination, he forfeited all rights under his contract. The company did not engage, and were not bound, to carry him in any other train, or at any other time, over the residue of the route.

The production of the conductor's ticket in nowise altered the case, or affected the terms of the original contract. It was evidence, indeed, that the holder had paid his passage, and was entitled to be carried to Morristown. But how and when? Why, clearly according to the terms of his original contract. It was evidence that he had paid his fare to Morristown, and was entitled to be carried there by the train in which he had originally taken his passage; for that purpose alone it was given to him; that train he had left voluntarily, without the knowledge or assent of the conductor, and without giving up his check. The check was, therefore, valueless; the right, of which it was the evidence, the passenger had voluntarily relinquished.

This is the clear legal effect of the contract between the company

and the passenger, in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage, or the custom upon the road, he is entitled to be carried at his pleasure either by one or by different trains, and at different times, over various portions of his journey, the burden of proof was upon the state. No such usage was established, although some evidence was offered upon the trial, for the purpose of proving it.

The defendant offered evidence to show that some years previous to the transaction, the company had adopted a rule, and given public notice, that a conductor's check was not transferable from one train to another. This, properly considered, is a simple warning to passengers, that they would be carried strictly according to the terms of their contract. Even if a previous custom had been proved (which it was not) for passengers to be carried over different parts of their journey by different trains, it was a mere warning that in the future the custom would not prevail. Upon the trial, this action of the company was presented to the court, and by them submitted to the jury, as if it were a by-law or regulation of the company affecting the rights of passengers, upon the reasonableness and consequent validity of which the jury were to decide. The court clearly intimated its opinion, that the regulation of the company was valid, but under the influence of the ruling of another tribunal, submitted the validity of the regulation as a matter of fact to the jury.

In this the court erred. Here was no evidence of any by-law, or of any regulation made by the company, affecting the rights of passengers upon the reasonableness or validity of which either court or jury were called upon to decide. The right of the passenger rested upon his contract. The notice given by the company was in strict conformity with his rights under the contract. Upon the evidence in the cause, if no proof had been offered of the notice given by the company, that conductors' checks were not transferable, the defendant would have been entitled to a verdict. Proof of that notice certainly placed him in no worse position. The company have an unquestionable right, under their charter, independent of any by-law or regulation, to charge different rates by different trains, or a higher price for travelling over the road as a way-passenger, by different journeys, than for a through passenger. This was in reality all that was involved in the evidence

of the action by the company, as proved upon the trial. The case does not fall within the operation of the principle, by which it was held to be controlled.

Assuming at the bar, as was done upon the trial, that the guilt or innocence of the defendant depended upon the validity of a regulation made by the company, affecting the rights of passengers, the question was elaborately argued whether the validity of such regulation can in any case be submitted as a question of fact to be decided by a jury, and the broad principle was assumed that the validity of every regulation made by a railroad company, regulating the concerns and affecting the rights of the road, is a question of law, to be decided by the court, and never can be submitted to a jury; that the company is bound to make regulations for the comfort and convenience of passengers; that the power is regulated by their charter; that what is lawful is reasonable; and that, therefore, every regulation is reasonable that is not unlawful.

The validity of the by-law of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company, or be in a legal sense unreasonable, and therefore unlawful, is a question for the court and not for the jury. *Commonwealth v. Worcester*, 3 Pickering, 462; *Paxon v. Sweet*, 1 Green, 196; *Ang. and Ames on Corps.* 357. But the *by-laws* of a private corporation bind the *members only* by virtue of their assent, and do not affect third persons. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the company, and may come within the operation of the principle. Within this limit it is the peculiar and exclusive office of the court to decide upon the validity of the regulation.

But there is another class of regulations, made by corporations as well as by individuals, who are common carriers of passengers, which operate upon and affect the rights of others which are not, properly speaking, by-laws of the corporation, and which do not fall within the operation of the principle. Of this character are all regulations touching the comfort and convenience of travellers, or prescribing rules for their conduct to secure the just rights of the company. It is not perceivable of this class of regulations, that they are never unreasonable unless they are unlawful. On the contrary, they are unlawful because they are unreasonable, or an unnecessary infringement of the rights and liberty of the pas-

sengers. The reasonableness and validity of a regulation, that passengers by railroad or steamboat should exhibit their tickets when reasonably requested, that they should not smoke or indulge in other filthy or offensive practices ; that male passengers should not enter a car or a saloon, especially appropriated to females, might be conceded, and the right of the company to enforce them, even by excluding, in case of necessity, the offending passenger from the train. But it would scarcely be contended that a regulation requiring passengers continually, or as often as the caprice or malice of a conductor might require it, to exhibit their tickets ; forbidding them to speak, or change their seats from one part of a car or saloon to another, when the right of no other passenger was affected, was a regulation lawful in itself, or which might safely be enforced. This latter class of regulations are no more in violation of the charter of the company, or of any particular statute, than the former. But they would be held unlawful because they are unreasonable, and an unnecessary infringement of the rights and liberty of travellers. The distinction between such regulations as are necessary, and conducive to the comfort and convenience of travellers, or to protect the rights of the company, must from its very nature be a question of fact rather than of law. The reasonableness and unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury.

In *Jenks v. Coleman*, 2 Sumner, 221, the action was brought to recover damages against the defendant, for refusing to receive the plaintiff as a passenger on board of a steamboat, of which the defendant was commander. The defence was, that an agreement had been entered into by the proprietors of the boat, with a line of stages, to carry their passengers from and to Providence and Boston. That the plaintiff was the agent of another line of stages, and that his object in going on board of the boat was to procure passengers, and thus interfere with the arrangement made by the steamboat proprietors. Justice Story, in his charge to the jury, said, "The true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jenks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought

to be for the defendant, otherwise to be for the plaintiff." If the question whether a contract entered into by common carriers be reasonable and proper, and one which may be enforced, even by excluding passengers from the conveyance, be a question of fact, to be decided by a jury, there is surely no violation of principle in submitting to their decision, the necessity or propriety, and consequent validity, of a regulation affecting the comfort or safety of passengers.

But there was in reality no such question involved in the present case. The right to transfer conductors' checks, resulted upon a contract which the company had a clear and unquestionable legal right to enforce. The question was improperly submitted to the jury, and the verdict is against law, and contrary to the evidence.

The Oyer and Terminer should be furnished with the advisory opinion of the court, that the verdict ought to be set aside, and a new trial granted.

When one purchases a ticket, entitling him by the rules of the company regulating the tariff of fares, to a continuous passage through, but not to stop at an intermediate station and complete his passage in another train, and avails himself of the reduction in price allowed to such passengers, and at the time of purchasing the ticket is ignorant of the rules, it has been made a question whether he ought to be affected by them. In *Cheney v. Boston & Maine Railw. Co.*, 11 Met. 123, the court say, "This might very properly be insisted upon in his behalf, if it were attempted to charge him with any liability created by such rules, especially if it were attempted to enforce any claim for damages by reason of them.

The question as to the right of the plaintiff to be transported as a passenger, does not depend upon his knowledge, at the time of the purchase of his ticket, of the difference of the price to be paid for a passage through the whole distance by one train, or that of a passage by different trains. The plaintiff might have inquired and informed himself as to that. If he did not, he took the mode of conveyance, the price of the ticket, and the superscription thereon, secure to him under the rules and regulations of the company." And this is unquestionably the true construction. If one is ignorant of the regulations of the company affecting the duty imposed by the issue of a particular ticket, he is bound to inquire or in some way inform himself on that point.

REQUIRING PASSENGERS TO EXHIBIT THEIR TICKETS ON PAIN OF
EXPULSION FROM THE CARS.

Hibbard v. N. Y. & Erie Railway Co., 15 *New York Reports*, 455.

A regulation of a railway company requiring passengers to exhibit their tickets, when requested to do so by the conductor, and in case of refusal authorizing their removal from the cars, is a reasonable and proper regulation, and binding upon the passengers.

It seems that a passenger having once forfeited his right to proceed further in the cars by refusing to show his ticket, it is for the company or its agents to say whether he shall be retained upon subsequently showing it. Per *Denio*, C. J.

If his expulsion, after such subsequent showing of his ticket, is unlawful, it seems the railway company would not be liable, but only those who committed the trespass. Per *Constock*, J. [Sed quære.]

If the servants of a railway company, in removing a passenger from the cars, wantonly use unnecessary force, *they*, and *not the company*, are responsible for the consequences. Per *Brown*, J. [Quære.]

OPINIONS.

DENIO, C. J. In my opinion, the learned judge before whom this case was tried, committed two capital errors: First, he refused to charge the jury that the plaintiff was bound to conform to the rules and regulations of the company, by showing his ticket to the conductor when requested so to do. As a substitute for this direction, he charged that a passenger was bound to exhibit his ticket when reasonably requested; and, he added, that if the conductor knew the plaintiff had paid his fare, he had no right to expel him from the cars, although he refused to show his ticket. The defendant was entitled to the instruction asked for, without qualification.

It was proved that the defendant's company had established a regulation by which passengers were required to exhibit their tickets when requested to do so by the conductor, and that in case of refusal they might be removed from the cars. If this was a reasonable regulation, the plaintiff was bound to submit to it, or he forfeited his right to be carried any further on the road. In my opinion the rule was reasonable and proper, and in no way oppressive or vexatious. In the first place, it was easy to be complied with. The railroad ticket is a small slip of paper or pasteboard, which may be conveniently carried about the person; and it in-

volves no conceivable trouble for the passenger, when called upon at his seat by the conductor, to exhibit it to him. Then no one can question but that this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free. A train of railroad-cars frequently contains several hundred passengers, a portion of them constantly changing as the train passes stations where persons are received and discharged. The tickets which are given as evidence of the payment of fare, are of as many different kinds as there are stopping places on the road: each being for the distance or to the place for which the passenger has paid his fare. The conductor must necessarily be a stranger to all or a large portion of his passengers. Unless he is allowed a sight of these evidences of the payment of fare, whenever he may require it, he is exposed to the chance of carrying the holder of them beyond the place to which he is paid, or of carrying persons who have not paid at all. If the conductor is not allowed to ascertain whether a passenger who has obtained a ticket still keeps it, there is nothing to prevent its being given to another passenger who has not procured one, and thus serving as a passport for several passengers. But it is argued that if the ticket had been once shown to a conductor, the passenger cannot reasonably be required to exhibit it a second time. If the duty of showing it were at all difficult or arduous, it might be a question whether the company would not be bound to devise some easier arrangement; or, if it was possible that the memory and other faculties of persons employed as conductors could be so cultivated that they could know and remember the persons of several hundred people, upon seeing them for the first time, and could, moreover, retain the recollection of the terms of the several tickets held by them upon their being once shown, it might be considered unreasonable to require a second exhibition of a ticket in any case. As this degree of perfection is unattainable in the present condition of mankind, I am of the opinion that it was lawful for this railroad company to require that persons engaging passage in its cars should show their tickets whenever required by the company's servants intrusted with that duty, upon pain of being left to travel the remaining distance in some other way in case of refusal. I do not think it was correct for the judge to leave it to the jury, as he did, whether the request to show the ticket a second time was reasonable. The regulation required that it should be shown,

when requested by the conductor, and the question for the court to determine was whether that regulation was lawful. 8 Co., 126 *b*. The judge would not pass upon that question, but submitted to the jury whether it was reasonable to require a conformity to it on the part of the plaintiff. There was no evidence tending to show that the conductor wished to vex the plaintiff, or put him to inconvenience. After the plaintiff had purchased his ticket and taken his seat, and had once exhibited the ticket, the train had stopped at a station (Wellsville), and had again started on its course. Then the conductor desired to see the ticket and was refused. He may not have been able to remember, if he knew, that the plaintiff had paid fare and had a ticket, whether it was for Wellsville or for a place beyond that station; or he may not have remembered his person so as to be able to determine whether he had got on at Wellsville, or had come from Hornellsville, or some place farther west. True, Mr. Crandall informed the conductor that the plaintiff's fare was paid and that he had a ticket, and Mr. Crandall may have been known to the conductor to be a truthful person, or he may have been an utter stranger. The company, however, had a test far more convenient to all concerned than the taking of testimony, to wit, the exhibition of their own ticket, which the plaintiff had in his pocket, but which he pertinaciously refused to show.

It is true, the judge put it to the jury to say whether the conductor knew that the plaintiff had paid his fare. Ordinarily, the law would hold that what a person knows at one time, he should be taken to know and remember at a short distance of time afterwards. The conductor had seen the plaintiff's ticket, and had some opportunity of studying its contents; and under this charge the jury would necessarily find for the plaintiff. The judge made no account of the peculiarity of the circumstances; of the number of persons the conductor would be obliged, in order to protect the company, under this rule, to recognize and remember; of the divers kinds of tickets which must be used; and of the haste with which this business must necessarily be done. It was precisely in consideration of these circumstances that the rule was made, and that it was reasonable, and therefore lawful. If the judge had submitted it to the jury whether the conductor knew and remembered that the plaintiff was travelling under a ticket which extended to the place where they then were, and whether his conduct

a requiring a second sight of the ticket was caused by a desire to harass the plaintiff, the only objection, so far as I can now see, could have been that there was not the slightest evidence to raise such a question. But this was not the point submitted. It was whether he knew that the plaintiff had paid ; and as he had shortly before seen the authentic evidence of such payment, the jury could necessarily find, as they did, that he had such knowledge.

The other error which I have supposed to exist in the charge is, that the judge held, in effect, that if the plaintiff offered to show his ticket, or did show it, after the cars had been stopped in order to put him out for refusing to show it, the conductor should not have persisted in expelling him. The request assumed that the jury might find that the conductor was right up to that time ; and the point decided was that, though this were so, the plaintiff saved the forfeiture by this late compliance with the company's rule. This question, like the other, requires a consideration of the peculiar character of this new mode of transporting persons. Railroad trains are run according to a scheme in which the time required in passing from one point to another, and the time required for the necessary stoppages, is accurately calculated. Any derangement or departure from the time fixed is exceedingly hazardous to the safety of the company's property and to the lives of the passengers and the persons employed in running the train. The most horrible calamities have often been the result of such derangements. A train of railroad cars cannot be stopped and again set in motion so as to attain its former speed, without considerable delay ; and if one passenger, by his unjustifiable humor, can cause the cars to stop, another may do the same thing, and the utmost irregularity may be brought about. The rule, therefore, was in my judgment plainly reasonable which imposed a forfeiture of his right to proceed further in the cars upon a person who should refuse to show his ticket to a conductor when requested. Having forfeited his right by his improper conduct, it was for the company or its agents to say whether he should be retained after having occasioned the inconvenience of a stoppage by his pertinacity.

There are some other questions in the case which I have not thought it necessary to examine, as those which I have mentioned are necessarily fatal to the judgment. I am in favor of a reversal.

BROWN, J. The instructions which the judge, upon the trial of this action, gave to the jury, and also those which he refused to give when requested by the counsel for the defendant, involve an inquiry into the rights and duties of the company under the contract which is the basis of the plaintiff's claim.

The defendant is a carrier of passengers for hire by railroad. "It is bound to give all reasonable facilities for the reception and comfort of passengers, and to use all precautions, as far as human care and foresight will go, for their safety upon the road, and is answerable for the smallest negligence in itself or its servants." (2 Kent's Com. 601.) Transportation by railway is one of the highest efforts of science and art, and imposes upon those employed in it a degree of care, circumspection, and diligence unknown to other modes of conveyance. It implies also a degree of authority in the direction and management of the trains, in their progress over the road, and in regard to the time and manner in which passengers shall enter and depart from, and the conditions upon which they are to remain within, the cars, little less than absolute. Such regulations as will enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just. It has a right to require that passengers shall preserve order; that they shall be seated and not stand up in the passage-way or upon the platforms; and that they shall abstain from any act which tends to impede or interrupt the conductors and managers in the transaction of their necessary business. A railroad company has also a right to prescribe how and at what places the passengers shall pay their fare or passage money, and what shall be the evidence to the conductor that such money has been paid and of the passenger's right to ride upon the train. It may also require passengers to accept tickets temporarily; to exhibit them from time to time upon the request and for the information of the conductors; and, finally, to redeliver such tickets, upon request, before leaving the cars. Some of these regulations are necessary to insure the safety of the passengers themselves, others to insure the payment of the regular fare and to protect the carrier from imposition. They may be enforced by such reasonable means as the company may have at its command; for, without some measure of power to give them effect, such regulations

would be of little avail. (*Commonwealth v. Power*, 7 Met. 596; *Hall v. Power*, 12 id. 482.)

By the rules and regulations of the New York and Erie Railroad Company every passenger is required to exhibit his ticket, if he has one, to the conductor, upon request, or, if he has no ticket, to pay his fare and accept one. And upon refusal to comply with the regulation, it is made the duty of the conductor to remove such delinquent passenger from the cars. The regulation, it appears to me, is not unreasonable, for the company is responsible for its unjust application, or for enforcing it with undue severity. No well-disposed passenger will refuse to accept a ticket and exhibit it as often as the conductor may reasonably desire it; and it is quite usual to place the ticket in some conspicuous place about the person of the passenger, so as to supersede the necessity of repeated inquiries. If one passenger may at his pleasure condemn the regulations of the company and put the conductors at defiance, all may; and such a result would put it out of its power to protect itself from injury, and to fulfil its duties to those who committed themselves to its charge. The regulation referred to assumes that an individual within the cars, who refuses, upon request, to exhibit to the conductor the customary evidence of his right to a seat, or to pay for and accept such evidence, is an intruder and a wrong-doer, and has no legal right to remain where he is. Such, I think, should be the legal, as it certainly is the natural, presumption. It is, therefore, quite right that he should be requested to leave the cars when he manifestly has no right to remain. If he refuses, the conductor may then employ so much force as may be necessary to effect his removal, at the same time using no violence and doing no unnecessary injury. If, however, the passenger refuses to comply, and resists, and injury happens, it is an injury for which the company is not responsible, for it is a result attributable to his own wrongful conduct.

The counsel for the defendant requested the judge to charge the jury, "That when the plaintiff paid his fare and took his ticket from the ticket-office at Hornellsville, for Scio, he agreed to conform to the rules and regulations of the company by showing his ticket to the conductor when requested so to do." The judge declined so to charge, and the defendant excepted. In this I think he erred. It appears to me the proposition embodied in the request is too plain to admit of a doubt. The regulation was a

necessary and a reasonable one, and unless railroad passengers are above all control they are bound to observe reasonable and proper regulations while within the cars, claiming the services and the care and foresight of the company. The refusal to instruct the jury as requested, coupled with what the judge said to them afterwards, left them to infer that if the conductor knew the fare had been paid, the plaintiff was justified in refusing to show the ticket. The judge then charged "that the ticket being the ordinary evidence of the payment of fare, a passenger is bound to exhibit his ticket when reasonably requested to do so; but if the conductor knew that the plaintiff had paid his fare he had no right to expel him from the cars, although he refused to exhibit his ticket." To this also the defendant excepted. This part of the charge imports that, if the conductor knew the plaintiff had paid his fare, the latter was under no obligation to show his ticket, and that the sole office of the ticket is as evidence that the fare has been paid. In this particular I also think the judge erred. It was no justification to the plaintiff though the conductor did know that the fare was paid. The ticket does not bear the name of the passenger to whom it is issued. It is usually inscribed with the day when and the office from whence it is issued, and the place to which the passenger proposes to travel. But it is as good in the hands of a stranger as it is in the hands of the person who paid for and took it from the office, and the conductor has a right to see it from time to time, that he may be assured it is not made the instrument of carrying two passengers in place of one. If the rule laid down by the court is correct, and the conductor has only a right to see the ticket when he has no knowledge that the fare has been paid, there is nothing to prevent a passenger, who has paid his fare with the knowledge of the conductor, from passing his ticket over to a stranger to be used as evidence that he also has paid his fare and acquired a right to be carried in the cars. The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: it is evidence in the passenger's hands that he has paid his fare and has a right within the cars; it insures the payment of the passage money by all who

take seats, and when it is redelivered to the company it becomes a voucher in its hands, against the office or agent who issued it, in the adjustment of its accounts. To say that the passenger is bound to exhibit the ticket when reasonably requested, but if the conductor knew the passenger of whom the request is made had paid his fare, he had no right to enforce his request, is a contradiction in terms which could do nothing less than mislead the jury from the true question before them.

If I am right in the opinion that the regulation for the exhibition of the passenger's ticket is a necessary and reasonable regulation, and one which may be enforced by removing the refractory passenger from the cars, then the court also erred in the instructions given to the jury for estimating the damages. The counsel for the defendant "requested the justice to charge that the defendant was not liable for the injuries which the plaintiff may have sustained in consequence of the assault in question, by their agents and servants." The justice declined, and told the jury "that if in pursuance of the defendant's orders and instructions, the plaintiff was wrongfully ejected from the cars, and was wantonly treated by the conductor or agents of the defendant in so ejecting him, the defendant is liable for the injuries resulting to the plaintiff from such ejection."

The jury were also told that they "might award damages in their discretion, as a compensation for the personal ill treatment to which the plaintiff had been subjected in ejecting him from the cars." The defendant excepted to the refusal of the court to charge as requested, and also to the instruction given them in respect to the measure of damages. The object of the request was, that the court should discriminate between those acts of the company's agents, done in the execution of its directions, and those done in excess of its instructions, and without authority or approbation. This, I think, should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor, and those who aided him, are not the company. They are its agents and servants, and whatever tortious act they commit by its direction, it is responsible for and no other. This is upon the principle that what one does by another he does by himself. For injuries resulting from the carelessness of the servant in the performance of his master's business, the latter is liable. But for the wilful acts of the

servant the master is not responsible, because such wilful acts are a departure from the master's business. *Wright v. Wilcox*, 19 Wend. 343, and the cases there referred to.

In removing a passenger from the cars who refuses to pay his fare, or exhibit his ticket, the servants of the company are limited to the use of just so much force as may effect that object, and no more. They are not to resort to force at all, until it becomes absolutely necessary, by the refusal of the passenger to depart upon request; and when they do resort to it, they are to use no more than becomes sufficient, and they are to do no unnecessary injury to the party. This is the extent of their authority; and if they exceed it, they, and not the company, are responsible for the consequences. The defendant had a right, I think, upon the trial, to have the attention of the jury directed to this distinction; for it is impossible to say, from an examination of the bill of exceptions, upon what ground so large an amount of damages was rendered.

There should be a new trial, with costs to abide the event.

COMSTOCK, J. If the plaintiff had forfeited his right to be carried as a passenger, by refusing to show his ticket when requested to do so by the conductor, and if the right was not restored by subsequently complying, then his expulsion was lawful, and he has nothing to complain of, unless greater force and violence were used than his own resistance rendered necessary. The verdict of the jury was for a wrongful expulsion and not for an excess of force.

If, on the other hand, the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see on what principle the defendant can be made liable for the wrong. The regulation, and instructions to the conductor, as we have said, were lawful, and they did not, in their terms or construction, profess to justify the trespass and eviction. The result is, that the wrong was done without any authority; and, therefore, that those who actually did it are alone answerable. The judge was requested to charge the jury that the plaintiff, if entitled to recover at all, could only recover such damages as he had sustained in consequence of the defendant's not performing its contract to carry him to Scio; to wit, damages to his business. The judge refused so to charge, but did charge that the plaintiff could recover, if at all, for per-

sonal ill treatment; in other words, for the unlawful assault and battery. It seems to me that the request was essentially right, and that the refusal and charge were erroneous. The request was made, and the charge given, upon the theory that the plaintiff's expulsion was unlawful. But if unlawful, then the company had not authorized it. There was, no doubt, an implied contract to carry the plaintiff to the place for which he had bought his ticket, and that contract was broken. The defendant being bound to carry him to Scio, might be liable for a breach of the engagement, even if the plaintiff had been expelled by another passenger. The defendant was bound even to prevent an unlawful expulsion and to carry the passenger through. But this is a liability entirely different from the one enforced at the trial. The conductor, according to the plaintiff's own showing, without authority from his principal, assaulted and expelled him from the train; and, under the charge given to them, the jury rendered their verdict for the personal wrong and outrage. This, I think, is contrary to the law of the case.

The conductor, it is true, testified that he acted "in pursuance of instructions from the defendant." By this I understand merely that he pretended to act, and justified his conduct, under the regulation and instructions which have been referred to. But if he mistook the authority conferred upon him, both when he committed the trespass and when he was examined as a witness, it cannot alter the law, or change the rights of the parties. His own mistake, as to the extent of his powers, cannot make the railroad company liable for acts not in fact authorized.

The judge also charged that a passenger is bound to exhibit his ticket when reasonably requested to do so; but if the conductor knew that the plaintiff had paid his fare, he had no right to expel him from the cars, although he refused to exhibit his ticket. It had been proved that the request was made just after the train had left a station, and while the conductor was going through and examining the tickets of passengers. The plaintiff, when called upon, refused to exhibit his ticket, saying that he had once shown it, referring to some previous occasion after he had taken his seat. It will be seen, therefore, that the request was made upon a proper occasion, in the usual round of the conductor's duties; and no suggestion was made on the trial that such request was dictated by any mere caprice or whim, or that it was fraudulently made in order to get a pretext for expelling the plaintiff from the train.

Now, the regulation of the company required the plaintiff on this occasion to show his ticket, and it contained no qualification depending on the previous knowledge of the conductor that the fare had been paid. It is, however, plausibly urged that, as the object of exhibiting a ticket is to show the conductor that the fare has been paid, he has no right to enforce the regulation if he already knows the fact. Still, I am of opinion that this is not a sound view of the question. The difficulty is in the nature of the inquiry which a jury must always be allowed to entertain, if we adopt this suggestion. How, it may be asked, is it to be proved that the conductor knew the passenger had paid his fare, if he refuses to exhibit the ordinary evidence of the fact? It can only be proved by showing that the ticket had already been shown to the conductor on some former occasion, or that the passenger himself, or some third person, informed him that the fare had been paid. I know of no other mode of getting at the fact; but the moment we admit any or all of these modes of inquiry, the regulation itself becomes entirely worthless. The conductor clearly is not bound to take the word of a passenger who refuses to comply with the regulation, nor the word of a third person; and still more clearly it will not do to say that one exhibition of the ticket must suffice in all cases, or in any case. The rule is a reasonable one, that the conductor may ask to see the tickets of passengers after leaving each station where new passengers are taken up. If a passenger refuses to comply with such a rule, and is expelled, the law should not allow him to allege and try the fact of the conductor's knowledge of the payment of the fare.

Without examining other questions, I am of opinion that the judgment should be reversed and a new trial granted.

All the other judges, except *Bowen, J.*, who dissented, concurred in this result; the court, however, declining to pass upon the question last discussed by *Denio, C. J.*, or that first discussed by *Gomstock, J.*

Judgment reversed and new trial ordered.

In *State v. Thompson*, 20 N.H. 250, it was held that a general regulation, established by a railway company, that the conductors on the road should take from the passengers their tickets as soon as practicable after leaving the stations where they entered the cars, or require them to pay their fares if they have no tickets, and that if any one did not give up his ticket or pay his fare, he should be put out of the cars as soon as convenient, was not a reasonable and proper one, unless a check or some evidence of the payment of fare was given to the passenger in exchange for his ticket or fare.

COMPANY CANNOT ENLARGE OR DIMINISH AMOUNT OF THE CAPITAL STOCK. — WHOLE CAPITAL STOCK MUST BE SUBSCRIBED BEFORE ASSESSMENTS CAN BE MADE.

Salem Mill Dam Co. v. Ropes, 6 *Pickering's Reports*, 23.

If the capital stock of a company is fixed by the charter, the company cannot enlarge or diminish it by its own act.

And if, by the charter, the stock of the company is divided into a certain number of shares, that number cannot be changed by act of the company.

No assessment for the general objects and purposes of the charter can legally be made upon any number of shares less than the whole number into which the capital stock is divided by the act of incorporation.

OPINION.

PARKER, C. J. Upon the general question presented in the argument of this case, viz., the legality of an assessment for the general objects and purposes for which the plaintiffs were incorporated, the court are unanimously of opinion that such assessment would not be valid.

We are brought to this opinion by a careful consideration of the act of incorporation, and by a just construction of the obligations incurred under the instrument by which the individual members associated and became corporators. We consider the special promise incorporated with the subscription, as making the persons and property liable to the extent of the subscription; that is, to pay all assessments which shall be legally made; the object of this form of subscription being obviously to create a personal duty upon those who should subscribe, beyond the statute liability which can be enforced only against their shares. The principle has heretofore been settled in analogous cases, that a mere subscription creates no promise, and gives no security to the corporation beyond the value of the stock, but that a promise superadded gives a right of action, where there are parties in being to give and take the promise.¹ And this distinction is reasonable; for as the objects for which such incorporations are applied for and granted are generally experimental, and as expenses must be incurred in trying the experiment, it is right and just that those who embark in the same cause should be holden to each other for a fair apportionment of the expenses; and it is not unjust, if a majority of those who associate should

¹ See *Bryant v. Goodnow*, 5 *Pick.* (2d ed.) 230 and note 1.

determine to complete the object, that those in whose promises they confide to bear their proportion of expense should be compelled to pay. But all such promises are in their nature conditional, and depend upon the terms on which they are made, with reference to the capacity, duties, and powers of the other party to the contract, the corporation; who cannot extend the effect of the promise beyond the original meaning and extent of it, any more than the other party can limit it.

The power of corporations is derived only from the act, grant, charter, or patent by which they are created. In this commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators.¹ If created with a fund limited by the act, it cannot enlarge or diminish that fund, but by license from the legislature, and if the capital stock is parcelled out into a fixed number of shares, this number cannot be changed by the corporation itself. Vide 1 Dane's Abr. 457, c. 22, art. 1, and the numerous authorities cited by that author. The promise on which this action is brought must be construed with reference to the charter of the company, it being founded on that, and is to be governed by it.

What, then, are the terms and the legal effect of the contract now under consideration? The words, after stating the object of the subscription and referring to the act of incorporation, are,—

“We, the subscribers, severally agree to take the number of shares of the capital stock in said corporation, which are affixed to our respective names, and to pay all such *legal assessments* on each of said shares as shall be made by the future government of said corporation, after the same shall have been organized according to said act; it being understood, that in case more than five thousand shares shall be subscribed for, the committee, under whose direction this subscription is opened, shall reduce them to that number, in such a mode as they shall think equitable.”

An analysis of this contract will show the true and only fair construction of it. The promise is to pay all *legal assessments*. Upon what? Upon the shares subscribed for. Shares of what?

¹ See Angell & Ames on Corp. 80, 81.

Of the capital stock of the company created by the act of incorporation. What is this capital stock? This must be answered by the act of incorporation, upon which the whole contract is founded; and a reference to that shows manifestly that the whole capital stock is composed of five thousand shares, which are liable to be assessed to the extent of one hundred dollars on each share. So that, *potentially*, the capital stock is five hundred thousand dollars, but the incorporators have a right to limit it to any less sum, by the assessment upon the shares, according to the amount of capital wanted for the object.

But this power of limitation is a privilege attached to the shares, and we think most clearly cannot be taken away by a reduction of the number of shares, leaving to the subscriber the hazard of being liable upon his subscription and promise to an amount much beyond what the actual expense of the project might subject him to if the original number of shares were liable to assessment. Suppose, instead of the contemplated sum of five hundred thousand dollars, in the process and execution of the project, one hundred thousand dollars should be found to be competent to the purpose. Then it would follow, that upon five thousand shares a tax of twenty dollars on each share would be sufficient; whereas, if the shares were reduced to one thousand, an assessment to the whole extent of one hundred dollars on a share would still be necessary.

Now a person called upon to subscribe would naturally make his own calculations of the probable cost of the undertaking. He would see that the utmost limit of taxation is one hundred dollars upon a share, and that probably not more than one-half of that sum would be required. I say probably, because the very fact of proceeding in the execution of the project with but little more than one-half the number of shares taken up, shows the opinion of the corporation, that half the contemplated capital would be sufficient. We think the subscriber cannot be deprived of this probable advantage, by the vote of the corporation reducing the number of shares, and that a tax founded on such reduction would be illegal.

Such, we think, is the spirit of the act of incorporation; the intent and meaning of the limitation of the number of shares to constitute the capital stock. It could have been introduced for no other purpose than to show the extent of liability. The accomplishment of this project *may* cost five hundred thousand dollars;

there shall be, therefore, five thousand shares liable to the extent of one hundred dollars each. It *may* cost much less; the shares may be taxed much less, but cannot be carried beyond one hundred dollars. These are the terms held out to the subscribers by the act of incorporation, and by the subscription paper itself; for the promise is, to pay what shall be *legally assessed according to the act of incorporation*. Besides which, it is agreed, that if there be an over subscription, the shares shall be reduced to the number prescribed in the act, and there is no provision for the case that has happened, of not much more than one-half of the number of shares being subscribed for.

There is another view of the subject which goes strongly to show the correctness of this exposition of the contract. Suppose the sum contemplated by the legislature as at least the possible cost of the undertaking, should turn out *to be all necessary* for its accomplishment; so that the expenditure of one-half the sum would, in all probability, without the means of increasing it, be the cause of the loss of every thing but the value of the materials; would the corporation have the right, by thus reducing the number of shares, to put in jeopardy the property of the corporators? Certainly not. Every subscriber has a right to calculate upon a fund computed to be commensurate with the object, and that each of five thousand shares should be liable, like his own, to a tax of one hundred dollars, in order to produce that effect. A power in the corporation to reduce the shares to one thousand, without the power of taxing them beyond one hundred dollars, would be a power to expend one hundred thousand dollars and no more, upon a project which, to be profitable or even useful, would require five times that amount. The money expended in such case would be nearly all lost and wasted. Nor do we believe that the corporation can make such a reduction legal, by a vote to limit the assessment upon a share to a less sum than one hundred dollars, for the same result of insufficient funds and a consequent loss might be produced.

If the subscription paper or contract had been in a form of words a little different, a question could hardly arise as to its construction. Suppose it had been, -- Whereas it is proposed to raise a sum not exceeding five hundred thousand dollars, for the purpose of erecting dams, &c., in the town of Salem, and the capital stock is divided into five thousand shares, now we, the subscribers, agree to take the number of shares set against our names and pay such

ums as shall be assessed upon our shares. What does this import, but that the subscriber to a share agrees to take and pay for one *five thousandth* part of the capital stock to be raised? Could he, in that case, by virtue of such contract, be held to pay a thousandth part? Certainly not. Now the subscription paper in this case is precisely of the same character, and of the same legal import and effect. That subscription and promise refer to the act of incorporation. That act requires that the capital stock shall be divided into five thousand shares; and the paper itself recognizes that number as expressive of the amount of stock.

It has been urged however in argument, that an examination of other parts of the act of incorporation will show that it was the intention of the legislature that the company, when organized, might proceed to execute the full purposes of their incorporation by assessments upon any number of shares over one thousand.

We construe the 7th section of the statute very differently, and think it shows most manifestly that the legislature had in view an organization for special and limited purposes, previously to the completion of the stock by a full subscription. What is this provision of the 7th section? Any two of the persons named in the act of incorporation are authorized by it to call a meeting immediately after the passing of the act, at which meeting a clerk or secretary may be chosen, who shall be duly sworn to record the doings of the meeting; and any acts may be done for the purpose of organizing the said corporation and *arranging its affairs*: Provided, no meeting shall be called, as aforesaid, before one thousand shares shall be subscribed for.

It is clear that it was not intended by this section to grant a power not contained in the other sections of the act, except so far as to authorize the calling of the first meeting for the necessary purpose mentioned in the section. It was to be a meeting of organization and preparation. Not even the officers, except the clerk or secretary, were to be chosen; but they were to arrange their affairs, that is, take all the preliminary steps necessary to the advancement of the undertaking; provide by-laws, agree upon the number of votes, and prescribe the powers, duties, and number of the general officers and agents necessary to be employed, together with the time and manner of choosing and appointing them. Clearly this was intended by the legislature to grant the power of acting only to a limited extent, for the mere purpose of taking such

precautionary and preliminary steps as would be absolutely necessary to the success of the undertaking, and even to the procurement of a full subscription. At this meeting "*any act or acts may be done for the purpose of organizing the said corporation, and arranging its affairs; at which meeting every person shall be entitled to one vote for each share owned by him.*" Why limit the powers of this meeting to these specified objects if, as contended, the corporation had full power of raising the whole capital upon any number of shares not below one thousand? And this, too, under the phrase *arranging its affairs*, which obviously means something short of carrying into execution the project in full, and assessing those who may have subscribed, to the extent of the liability of the shares. The corporation, under this section, had the same power of taxing upon one thousand and one shares, as they would have upon twenty-six hundred; and can it be supposed, that under the general terms of this act, and under the subscription, they can have the right to reduce the taxable capital down to one-fifth of that on which the subscription was founded? Upon what principle can a tax on two thousand and six hundred shares be sustained, that would not equally justify one upon any less number not below one thousand? But it is said they became a corporate body by the acceptance of the act, and being such they enjoy all the powers vested in the body, and, of course, the power of proceeding in the objects of the incorporation, and then of necessity follows the power to assess all necessary taxes. But all this is *petitio principii*. The whole question is whether they were a body politic and corporate with full powers, before the capital stock was created, and whether the legislature was not careful to give only limited powers until that event should happen. For no other reason is it possible to conceive why the specification of power under the 7th section should have been enacted. And it certainly cannot be within the authority of a company, by a vote, to assume a power beyond the provisions of their charter.

This question goes deep into the interests of those who embark in projects of improvement with the right to calculate upon a certain capital, and on their own liability to contribute towards raising it if with the expectation of five hundred associates, or shares in that proportion, those who represent two hundred can assemble, and agree to carry on the whole work, by a major vote of that number, and assess themselves and the rest, and these doings are

binding on the minority, the effect will be to discourage such enterprises, and subscriptions to objects which from their nature must be of doubtful success, will cease. A man may be willing, from public motives alone, to take his chance upon a limited proportion of five thousand shares of a capital stock, and altogether unwilling to adventure upon half that number ; and if he secure himself by the terms of his subscription, he cannot be bound beyond it by a major vote of those who may choose to persist in the adventure under discouraging circumstances.

But it has been argued that, by the 6th section of the act of incorporation, the power of making assessments upon less than the whole number of shares contemplated as the amount of the capital, is given by express provision or necessary implication. We think a contrary inference more natural and just.

This section provides that the corporation, or its officers duly authorized by its by-laws, may from time to time make assessments *upon the shares subscribed for*. If this had been all, the argument would have been plausible, but only plausible; for the whole statute would have been taken together in the construction, and then by the shares subscribed for, would be found to be intended the five thousand shares which were to constitute the capital stock. But the assessments are to be made *upon the shares subscribed for, until the whole amount of the said capital stock shall be paid in*. Now the capital stock here contemplated was five hundred thousand dollars, because the power was given to assess to the whole extent of one hundred dollars a share on all the shares. The object of this section, to wit, an assessment upon the shares subscribed for until the capital stock should be paid in, could never be attained by assessments upon less than the whole number of shares ; and, therefore, the legislature did not intend by this phraseology to defeat this general object before explicitly stated. There is nothing then in the statute which has a tendency to vary the obvious and necessary construction of the 4th section, which requires that the capital stock shall be divided into five thousand shares. This is to govern and limit the contract upon which the suit is brought, for the contract is referred to and founded upon this provision. And to extend it further would be to substitute a contract of our own making, for that on which the parties agreed.

And we perceive not the hardships which have been said to be likely to follow this decision. The act of incorporation remains in

full force. If the proposed undertaking is likely to prove useful and profitable, it will be no difficult matter to procure subscribers enough, in addition to those already bound, to authorize the company to proceed. In that case the present subscribers cannot recede, and we think them bound by their promise, as well as upon their shares, to submit to and pay all the assessments which may then be made within the terms of the act. It probably was never before attempted to proceed to the final execution of a public or private project compulsorily, upon one-half of the contemplated shares set forth to the subscribers as representing the amount of stock. In the act establishing the Boston and Roxbury Mill Dam Company, the possibility of a failure of the subscription was anticipated and guarded against, by enacting in the 9th section, that the corporation, or its officers, may make assessments on the shares subscribed for, for the purpose of effecting the objects of the corporation, and for any other necessary purpose; provided that the whole amount of the assessments shall not exceed one hundred dollars on each share, and in case the amount of one hundred dollars so assessed upon each share will not supply the necessary funds, the corporation may raise the funds required by *selling any shares not subscribed for*, or by creating and selling any number of shares over and above the number prescribed in the act. The subscribers under this act of incorporation were aware that their shares might be assessed, although the subscription might not be full, and probably considered it immaterial, as nothing but their shares would be liable; and even if they should make special promises to pay the assessments, they would do it with a full knowledge of the consequences. Not so in the case before us, for from the tenor of the subscription paper, and the act of incorporation to which it referred, they would have no means of conjecturing, that by a vote of the corporation reducing the number of shares, they might be held personally to pay a much larger sum than otherwise would be chargeable upon their shares.

Hitherto we have considered only the general question, whether the corporation can proceed to make assessments for the general objects and purposes of the charter, upon the subscription as it now stands, or upon any number of shares less than the whole number into which the capital stock is divided by the act.¹ It is a

¹ See *Salem Mill Dam Corp. v. Ropes*, 9 Pick. 195; *Central Turnp. Corp. v. Valentine*, 10 Pick. 145, 146.

distinct question, whether the action can be maintained for the specific tax for which it is brought.

It is agreed in the statement of facts, that previously to the assessment of this tax, "a large sum of money had been expended by the board of directors, and many contracts had been made by them." The amount of the money disbursed, and the nature and extent of the contract, are not specified; but it appears by a certificate of the treasurer, which has been handed to us since the argument of the cause, that the disbursements made, together with what is due for necessary expenses, amount to \$11,412.23; and that contracts have been made for lands, wharves, flats, &c., to the amount of \$10,512.50: besides which there are other pending contracts, relating to timber and materials, the nature and amount of which are not stated. In regard to these contracts we do not think they afford a basis for the assessment, because they relate to the end and the object of the corporation; and whether authorized or not, so as to make the corporate property liable for damages for the breach, or the directors by whom the contracts were made, or such members of the corporation as may have expressly assented to the making of the contracts, we are clear that the incorporators are not personally liable upon their promise, because an assessment for this purpose is not a legal assessment within the terms of the promise and within the provisions of the act.

If the corporate powers to the extent of assessing upon the stockholders for the whole expense of the undertaking, did not exist until the whole number of shares had been taken up, which we think has been shown, it follows, necessarily, that there was no power in the corporation to authorize contracts made for the purpose of completing the undertaking; and then it would also follow, that the act of the directors in making such contracts was without legal authority. If it be granted that a contract justifying an assessment could be made for the purchase of lands, wharves, &c., to the value of ten thousand dollars, it would not be possible to deny to the directors the same power to make one or more contracts for the completion of the whole object, should it require the utmost limit of taxation upon the shares. This, it is said, will be hard upon those who have contracted with the directors or their agent, upon the faith and confidence that their acts would bind the corporation and the individual incorporators by the terms of their subscription. But if hard, it is not new, that persons have

made contracts with supposed agents, expecting the principals would be bound, and have been obliged to rely for their remedy upon the personal liability of those who assumed to be agents.¹ But it will be hard upon the directors to be made personally liable on contracts which they supposed they were making for the corporation. This is true, but the hardship cannot affect the legal principles by which the case must be governed. If property was the subject of their contracts, and the directors should be obliged to pay for it, the property will be theirs; if damages only for the non-performance of the contracts should be recovered, it may be supposed that the terms of the bargain were so equal as to produce no great distress; and if any of the corporators stimulated the directors to the exercise of this authority, by acts or votes, it may be that such persons will be held, in a proper action, to contribute to make up the loss. But those corporators who dissented, not being bound by the tenor of their original contract, cannot be held to contribute towards expenditures which were not warranted by the state of the corporation when they were incurred. From the precaution used in regard to the contracts actually made, of making them depend on the prosecution of the enterprise, it is not probable any difficulty will arise from this source.

But in regard to the disbursements actually made in money, or for which contracts are subsisting, in relation to expenses of a preliminary nature, necessarily incurred to obtain knowledge on the subject of the undertaking, or for the purpose of forwarding the subscription, and extending the public patronage, we have come to a different conclusion, in which we think we are equally well warranted by the act of incorporation and by the terms of the subscription. We suppose all the preliminary expenses, such as for necessary surveys, legal advice in relation to titles to land which it might be necessary to acquire, employment of many persons, expense of meetings, and a variety of charges incident to the commencement of so considerable an object, are in the nature of charges either upon the original promoters of the design, or upon the corporation when organized; upon the latter, if they expressly or by implication assume the same. And we take it for granted that these expenses have been assumed, and that they constitute the amount stated as actual disbursements by the directors, or

¹ See *Hastings v. Lovering*, 2 Pick. 221; *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. 56; 2 Kent's Comm. (3d ed.) 631, 632.

that similar expenses have since been incurred by the corporation itself, which constitute these disbursements. On this subject, however, we are not sufficiently informed, as the items which compose the gross sum charged as disbursements are not stated. If we found our opinion upon a false basis in this respect, and the parties think it worth their while to contend further, a new trial can be ordered to settle this point.

Supposing, then, that the sums expended are for objects such as above mentioned, or similar to them, that is, for purposes preliminary to the actual execution of the project, we think a tax not too large to cover such expenditure is valid, and that the defendant is bound upon his promise to pay it.

And we found our opinion upon a deliberate consideration of the act of incorporation, and particularly the 7th section of that act.

The legislature and the petitioners for the act were probably aware that the nature of the project which was wished to be authorized, was such as to require considerable expense, in order to produce that degree of information which would be necessary to insure a sufficient subscription. The scheme was new, except that it was preceded by the Boston and Roxbury Mill Dam Corporation, which, notwithstanding the most sanguine expectations, was known to have failed in regard to any profit to be derived by the owners of stock. The employment of much skill and judgment was requisite to enable them to show the practicability of the scheme, and its utility or probable profit. Provision, therefore, was made in the act of incorporation for the organization of the company upon one-fifth part of the number of the shares constituting the capital stock, and power was given to the corporation so organized, to "arrange its affairs." We have before shown that the power given under this phraseology was necessarily a limited power. We are equally clear that more was intended than a mere organization, for this power of arranging its affairs is superadded to the power previously given to organize the company. Within the reasonable construction of this phrase, "arrange its affairs" (presuming, as we are bound to presume, that something was intended), we think was given the power to look into the circumstances and affairs of the project, the expense to be incurred to bring it into its existing state, the measures necessary to attract the public approbation and patronage, delineations, plans, surveys,

philosophical examinations of the surface and contents of bays, coves, &c., to be occupied, expense of meetings, procuring subscriptions, &c., all of which might be necessary to enable the projectors to give such an exhibit of probable results as would be likely to promote the subscription.

Having this power in regard to these preliminary arrangements, and being a corporation, we think the power to assess for the purpose of defraying the consequent expense necessarily follows; for, without any express authority, corporations may raise money by assessments for the legitimate purposes of their institution.

And power to this extent must be presumed to have been recognized by each subscriber, for he refers to the act, and is bound by a fair construction of it, whether he was aware of it at the time or not.

Had the corporation immediately upon its organization, with one thousand shares only subscribed, voted to raise ten thousand dollars for the purpose of enabling the directors to procure all necessary information, and to take all proper measures to procure a full subscription to the projected measure, and to pay all expenses which had been incurred in obtaining the act of incorporation and otherwise in promoting the object, we cannot doubt but an assessment founded on such vote would have been legal and valid, and would be justified under the power given to "arrange its affairs." Such purposes would be mere arrangements, and the power being granted to make them draws after it the power of providing by assessments for the expenses certainly and necessarily incident and consequent.

Suppose after such measures had been taken, and an expense unavoidably incurred, the result of the investigation had been so unfavorable as to induce the majority of the actual corporators, or of shares, according to the mode of voting, to discontinue any further proceedings, and abandon the project;—how shall these expenses be defrayed? Certainly by a tax, for the expenses were incurred for the corporation, and with full power to incur them by virtue of the 7th section of the act. It is true, a tax might be unavailing amidst such circumstances if there were no obligation collateral to that which by law rests upon the shares, but where there is a personal engagement there is no difficulty. Every subscriber, in such case, is made to pay what he promised, and no more. The assessment only apportions upon each subscriber his

quota of the whole expense, according to his interest in the undertaking.

No vote has been produced showing the purpose for which this assessment was granted, and we do not think it necessary; for if the whole product of the assessment does not exceed the sum wanted for the expenses which may lawfully be provided for in this way, it may be presumed that this was the object of the assessment, and that the money so raised will be applied to these purposes.

The result of the whole is that the defendant is personally bound by his promise to pay all such assessments as should be legally made; that an assessment made to raise money to defray expenses necessarily incurred in arrangements preparatory to the execution of the objects of the incorporation is legal; that expenses of that nature having been incurred, and the assessment which is the subject of this suit not exceeding the sum necessary for the payment and discharge of them, the defendant is answerable for his proportion, according to the number of shares he subscribed for, and must therefore be defaulted.¹

PROVISIONS IN THE CHARTER OF A CORPORATION REGULATING THE TRANSFER OF SHARES MUST GOVERN SUCH TRANSFER.

Fisher et al. v. The President, Directors, and Company of the Essex Bank,
5 *Gray's Reports*, 373.

Where the charter of a bank provided that the stock should be transferable only at its banking house and on its books, it was held, that a delivery of the certificates of shares, together with an assignment and blank power of attorney from the vendor to the vendee, with notice to the bank of such transfer, was ineffectual to pass the property as against a creditor of the vendor who subsequently attached it, but without notice of the transfer.

In February, B. sold to the plaintiffs forty shares of the defendants' stock, delivering to them the certificate thereof, which stated the said shares were transferable only in the books of said corporation at said bank, by B. or his attorney; and at the same time B. executed and gave to the plaintiffs an instrument of assignment of said shares containing a power of attorney in blank to transfer the

¹ See Angell & Ames on Corp. 306-308.

same. In April, the plaintiffs wrote the president of the bank that they had such stock with power of attorney annexed, and which they were authorized to sell, and desired his assistance in getting a purchaser, saying that B. was absent a few days on account of sickness in his family, but would probably be at home by the time they could receive a reply, on the receipt of which they would forward the stock if the price was satisfactory. The president testified that he received the letter, but did not consider it a proper notice or demand to transfer the stock. On the 7th of May, the stock was attached by a creditor of B., and on the 10th of May an attorney of the plaintiffs presented to the cashier of the defendants the certificates and power of attorney aforesaid, and demanded a transfer to them of the stock. This was an action of tort to recover damages for the defendants' refusal to transfer said shares. The plaintiffs resided in New York, and the defendants' bank was in Haverhill, Massachusetts.

OPINION.

SHAW, C. J. On the case presented by this report, it is argued, in behalf of the plaintiffs, that by the acts done by Bingham, the former owner, and the plaintiffs, all his legal interest and attachable property in those shares was divested, and had become vested in the plaintiffs before the 7th of May, when the attachment of McLean was made, and therefore that attachment was unavailing to affect them.

We do not consider the plaintiffs' letter of the 13th of April as bearing upon the question. It does not purport to give notice to the bank that the plaintiffs have purchased the shares; but rather the contrary, that they have the shares with power of transfer annexed. By apologizing for Bingham's temporary absence, they rather seem to intimate that his nominal ownership on the books still continued, to some extent and for some purpose. But, for reasons hereinafter stated, had this been a more formal notice of the transfer of the shares to the writers, and this given to a proper officer of the bank, it would have been unavailing.

Shares in incorporated companies, such as banks, insurance companies, bridges, turnpikes, and railroads, have long been considered in this commonwealth as property of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of apprecia-

tion as vessels, or merchandise, or other personal chattels. But it is not visible or tangible, and therefore not, like merchandise, capable of passing by manual delivery.

A nearer analogy perhaps is that of a chose in action, capable, like this, of being assigned in equity, by a delivery over of the certificate, which is the assignor's muniment of title, with an assignment duly executed, transferring to the assignee all the assignor's right, title, and interest. And yet it is not like the assignment of a chose in action, which is the transfer of the assignor's interest in a debt, and vests in the assignee an equitable right to collect the debt in the name of the assignor.

The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation. Again; when a transfer is rightfully made and completed, it vests a right in the transferee, not merely to act in the place of the vendor and in his name, but substitutes him, in all respects, as the legal and only holder of the shares transferred, to the same extent to which they were before held by the vendor. The title therefore, by which such interest is held, is strictly a legal title; it is created and defined by law; its benefits are secured by law; it is transferable by operation of law, and may be attached on mesne process and seized on execution, and sold by legal authority to satisfy the debts of the owner.

Before any method was established by positive law, how, by what mode, or by what precise and definite act, such property should be considered as ceasing to be the property of the seller and becoming the property of the purchaser, courts of justice might well resort to the common-law modes of transferring similar incorporeal interests, and hold that a delivery of the only muniment of title held by the owner, with the execution and delivery of an assignment of his interest, by indorsement on the certificate or otherwise, should by analogy be held to be a valid transfer, and, when notified to the bank, should be considered as having taken effect at the date of such delivery.

But whatever common-law rules courts may have felt bound to adopt, in the absence of any express rule of law, in determin-

ing what act constitutes the actual transfer of shares, the point of time at which the one alienates and the other acquires a legal title to such shares, we can perceive no room to doubt that, where it is so regulated, such law must govern. In the present case, there is such an express provision in the act of incorporation itself. The bank is of recent origin, the act was passed in 1851. St. 1851. c. 269. Like most other modern acts of incorporation, the act, after creating the corporation, giving it a name, fixing its location and limiting its capital stock, defines its powers and duties by reference to other acts on the subject. But § 3 is a special provision to this effect: "The stock of said bank shall be transferable only at its banking house, and on its books." By the law of this commonwealth, acts of incorporation are deemed public acts. Rev. Sts. c. 2, § 3. Like other public acts of legislation, their provisions constitute laws, by which all courts and magistrates, all citizens and subjects, are bound.

But it was strongly urged, in the learned argument for the plaintiffs in this case, that this provision in the charter can have no greater force and effect than a by-law of the corporation in the same terms, and does not make a transfer on the books of the bank necessary to pass the title. There is something in one New York case, which countenances this suggestion; but perhaps it originated in the peculiar provisions of the New York statutes. If the corporation are fully authorized to make by-laws, regulating the transfer, there would seem to be some ground for holding that they would be binding upon those holding or seeking to hold shares in the same corporation. If a by-law would have the same effect, then it is unnecessary to make the distinction between a by-law binding upon corporators, and all those claiming to stand in the relation of corporators, and a general law of the commonwealth binding on all its subjects. But if there be such a distinction, then here is a law of the commonwealth binding upon all.

But the argument goes further, and insists that the transfer at the bank is not essential to transfer the property to a *bona fide* purchaser, but is merely a regulation for the convenience and protection of the bank.

We can see no ground upon which thus to restrict the plain provision of the statute. If we may judge of the intended operation of an act of legislation from the useful and beneficial purposes it may tend to promote, we should construe it as

having a much broader and more comprehensive scope. We are to take it in connection with all other existing laws.

As a great amount of property is held in Massachusetts in the shares of corporations, it is of importance that the title be easily and certainly ascertained, that the mode of acquiring and alienating it be fixed and known, and that it may at any time be made available, by process of law, for the debts of the owner.

In no way can these objects be so well effected as by a transfer at the bank. The law might have provided that the bearer of the certificate should be deemed the holder, so that it might pass from hand to hand by mere manual delivery. But this would be attended with almost inextricable difficulty. It would be impossible for officers and co-proprietors to know who their associates were, and at every meeting nothing could be done till those present should produce their certificates, and thus show who were entitled to vote; and, even then, certificates might change owners during the meeting. The shares could never be attached; for the officer could have no means to obtain possession of the certificate from a reluctant debtor adversely interested; and, without it, the shares might pass the next day to a purchaser without notice.

2. The certificate, in the form now given, may show who is the legal owner at the date of its issue; but this outstanding certificate may have been loaned, pledged, assigned in equity, which it is now contended would, as between the parties, be a good and valid transfer. It cannot therefore be known, by the books of the bank, who is proprietor at any one time.

3. It is obviously an object of great importance, that this large amount of property should be attachable and liable to be sold on execution. This has long been the policy of the state by earlier statutes, ultimately embraced in the Rev. Sts. c. 90, § 36; c. 97, §§ 36 *et seq.* The certificate being in the hands of the debtor, or some other person on his account, and his interest being adverse to that of the attaching creditor, the officer could seldom, if ever, take possession of it as of a chattel. It is therefore provided that the attachment may be effected by leaving written notice at the bank; and, on a sale on execution, it is made the duty of the bank and its officers, on notice and request, to give the purchaser a new certificate. This, of necessity, supersedes the outstanding certificate to the former holder.

All these objects are most effectually accomplished by making the transfer at the bank, the decisive act of passing the property, the legal, transferable, attachable interest. I do not stop to ask precisely what particular act would constitute such a transfer; whether it must be actually entered on the books, or whether the delivery of the certificate by the holder ready to transfer, or with a written transfer executed, so that nothing remains but the mere executive act of the clerk, is sufficient. In either case, it would show who is at any time the actual owner by the books, and inform a creditor, or other person having occasion to know and right to inquire. It is necessary to fix some act, and some point of time, at which the property changes and vests in the vendee; and it will tend to the security of all parties concerned, to make that turning point consist in an act which, whilst it may be easily proved, does at the same time give notoriety to the transfer. It would seem to us to be going beyond the rules of just exposition, to hold that a plain provision of statute law, calculated to promote the security of important legal rights of parties in important particulars, should be construed to be a regulation made for the convenience and protection of banks. The clause itself is too clear to admit of doubt: "Shall be *transferable* only," that is, capable of being transferred; the largest and broadest term to express alienation on one part, and acquisition on the other; and the word "only" carries an implication as strong as negative words could make it, that is, in no other mode. It was not to prescribe one mode, leaving others unaffected; it made that mode exclusive.

Nor is this position without high authority to support it. In *Union Bank v. Laird*, 2 Wheat. 390, it was held by the Supreme Court of the United States that, where shares were, by the act of incorporation, made transferable on the books, no person could acquire a legal title in any other mode.

The early Massachusetts cases cited for the plaintiffs, such as *Dix v. Cobb*, 4 Mass. 508, were mere equitable assignments of choses in action, and held valid as equitable assignments.

Quiner v. Marblehead Social Ins. Co., 10 Mass. 476, was the case of a new corporation, the full amount not paid in, no certificates to proprietors issued, but certain instalments had been paid in by subscribers, for which receipts had been given. The act of incorporation provided that no transfer should be valid till the stock

was all paid in. It was held that an assignment of these certificates, with power to complete the payment in the name of the assignor, was a good assignment in equity. Besides, there does not appear to have been any clause in the charter or by-law directing how shares should be transferred when the company should be organized and in operation.

In the case of *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, the old certificate, together with an executed assignment of the shares, was tendered to the secretary of the company at their office in business hours, with a power of attorney to transfer on the books, and a new certificate was demanded. This was a full compliance with the by-law on the part of the purchasers; it was the duty of the company then to enter the assignment, and they could not set up their own wrongful act in refusing to enter the transfer, and an attempt to attach the shares themselves, in their own defence. The reasoning of the court may have gone further in stating the grounds, but these were amply sufficient to warrant the adjudication.

The case of *Sargent v. Essex Marine Railway*, 9 Pick. 202, is much nearer the present case, and, so far as the requirement that the transfer be made at the bank rests on a mere by-law, is in point. The by-law required that all transfers be made in a book, in a specific form, and transferable only on the books. The court consider this by-law, requiring a transfer in a particular form on the books of the bank, as an arrangement of the corporation for their own convenience. But they add: "Neither the act of incorporation, nor any other statute, requires that an assignment shall be recorded in order to give it validity." 9 Pick. 205. This seems to carry a clear implication that if any provision of law, binding on all persons as such, had required it to be recorded, it must be entered in the books, or delivered to the proper officer for record, to give it validity.

We are aware that several of the New York cases cited in the argument are decisions contrary to the rule we now adopt. But it is to be remarked that, in the case of *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, before the court of errors, the chancellor and a respectable minority of the members of the court dissented on this point, and were of opinion that, when the charter contains a provision that no transfer shall be valid unless registered in the books, an unregistered transfer does not convey

a legal title, but an equitable interest only, subject to all prior equities.

And we think the authority of the case in New York is more than counterbalanced by the decisions of several of the neighboring states.

In Vermont, the court say, "We entertain no reasonable doubt that the mode of transfer of stock pointed out in the charter is the only mode which the public are bound to regard as conveying the title. All persons, unaffected with notice to the contrary, are at liberty to act upon the faith of the title being where it appears upon the books of the corporation to be." *Sabin v. Bank of Woodstock*, 21 Vt. 353.

In Connecticut, there are several cases precisely in point. The question of actual transfer is considered to be a question of legal title; and in all transfers under such charter and by-law, the change of title is held to take place when the instrument of transfer is received for record by the clerk, and the transfer bears date from that time. *Oxford Turnpike v. Bunnel*, 6 Conn. 558.

In the present case, it is insisted that the plaintiffs presented the certificate, with a transfer from Bingham, and demanded a transfer before the sale on execution. This is true; but the attachment on mesne process was made before any such notice given and demand made by the plaintiffs; and the title of the attaching creditor relates back to the time of attachment. We are of opinion, therefore, that the attachment and subsequent sale gave that purchaser the better legal title.

*Plaintiffs nonsuit.*¹

There are two points, which naturally come under consideration, in regard to creating liens upon choses in action:—

1. Whether the assignment is sufficient to create the lien as between the immediate parties to the assignments?

2. Whether the transaction has become sufficiently perfected, as regards the creditors of the assignor?

In regard to the former inquiry, the constructions of the court have been very liberal in favor of the assignee. Any act which clearly indicates a contract to that effect; that is, that the minds of the parties have definitely settled upon the fact that the title shall pass, as between the immediate parties, will be held sufficient. There is no absolute necessity, in the case of stocks, or shares in joint-stock companies, that the certificates, or evidence of the ownership, shall be transferred to the assignee; or, if transferred, that any formal assignment in

¹ See *post*, *Pinkerton v. Manchester & Lawrence Railw.* and note.

writing shall be made. It is more common in transactions of this kind, that both the transfer on the certificates, and their actual delivery to the consignee, should concur. And where either is omitted, it will naturally raise some question in the mind of the court, how far the transaction was really intended to secure the absolute transfer of the title. And where both the transfer and delivery of the certificates are omitted, it must require very satisfactory explanation how that should be entirely consistent with the absolute purpose to transfer the title, in the present tense. But as there can be no question such cases sometimes do occur, the discovery of such an omission will not absolutely avoid the assignment, as between the parties. As the assignment is matter of contract, and, like a transfer by sale, may be made effective between the parties by way of mortgage, without any change of possession, the effect of the evidence, as between the parties, must turn upon the point, whether the agreement was really concluded between them. Upon this point there is not much occasion for debate in the books, in regard to cases as they ordinarily arise. Redfield on Carriers and Bailm. §§ 662, 663; 2 Story's Eq. Ju. §§ 1039, 1040, 1040 a, and cases cited.

But in regard to the second inquiry, what shall constitute an effectual delivery, so as to defeat the rights of creditors to levy upon or attach the same property, or of subsequent purchasers without notice, there is constant discussion in the books, and we suppose it will be likely to continue, since such transactions are so infinitely diversified, that we could not fairly expect that new cases will not continue to arise.

It seems to be agreed upon all hands, that in the case of a mere pledge of shares for the security of a debt, a formal delivery will be required to create, or to consummate, the contract, since it is of the very essence of a pledge that the possession be transferred to the pledgee. For as the general title of the thing still remains in the pledgor, unless the possession were transferred, there would be nothing to uphold the contract. Redfield on Bailm. §§ 659-674 and cases cited. This may be effected by a formal, or even a blank, indorsement or assignment of the certificate and delivery of the same to the assignee. Nothing more is ordinarily required to complete the contract as between the immediate parties.

But, as to third parties, something more is commonly required. Some such visible, or ascertainable, index of the change of ownership, as will naturally put those interested in the question upon inquiry, and thus lead them to correct information upon the subject, must exist. 1 Story Eq. Ju. § 421 b, and cases cited in note. Some of the American states have attempted to maintain a different rule, as that the assignment being complete between the parties, will be held good as to third parties, whose rights are subsequently acquired and perfected by actual possession, without knowledge of the prior transfer. *Muir v. Schenck*, 3 Hill (N.Y.), 228, and cases cited by *Cowen, J.*, in the opinion of the court. But this rule has never obtained in England, and only to a very limited extent in this country, and is repudiated by all the best authorities. 1 Story Eq. Ju. § 421 c, and cases cited.

But we think there can be no fair question, that where the law of the state, as applicable to corporations, whether it be by a provision in the charter

of the particular company, or by a general statute or settled course of decision in the courts, requires that shares shall be transferred in a particular mode, as, in the present case, that they shall "be transferable only at its banking house and on its books," there must be a substantial compliance with the requirement, in order to protect the property against future assignments or levies. This general question of the necessity of compliance with the local law of the state, in regard to transfers of property, within the state, although the contract was made elsewhere, and in a place where no such formality was required, is carefully examined, in an opinion prepared by us many years since; and the views are such as we must regard as entirely sound, although taking an extreme view, in some sense, of the law applicable to the subject. It is the same maintained by Mr. Chief Justice *Shaw*, in the principal case, and also in the case of *Sabin v. The Bank of Woodstock*, cited with approbation by him.

We could not better express our own views in regard to the general rule of policy, and the necessity of adhering to it, than by adopting a portion of the opinion of the court, in *Rice v. Curtis*, 32 Vt. 464 *et seq.* And as the transfer of the shares in the principal case was made in the State of New York, and was valid by the law of that State, and was held invalid as against subsequent attaching creditors, by reason of non-compliance with the requirements of the charter of the bank, or the local law of the state where the corporation had its existence, the cases are precisely parallel; the question in the case of *Rice v. Curtis* being how far a transfer of personal property made within the State of New York, where the parties resided, and made in conformity with the laws of that state, could be upheld in Vermont, when there had been no sufficient compliance with the laws of Vermont to create an effectual transfer in that state as against creditors. It was there said, —

"The only ground upon which it is urged that such a change of possession is required in order to perfect the assignment when made out of the state is, that this is a rule of policy uniformly required to be observed in the transfer of all personal property within the state as a visible index of its being no longer liable upon process against the former owner; that it is no part of the contract of assignment, to be controlled by the law of the place of assignment, but a matter purely of local policy, to prevent fraud, and therefore not a matter to be controlled by the contract, or by the law governing the contract, but a local form or act to be governed by the law of the forum where the property is situated and the remedy sought.

"There is no doubt of the existence and universal recognition of such an exception to the operation of foreign contracts, valid by the law of the place where made. The rule is more commonly illustrated by foreign contracts affecting religion, morals, or state policy, the enforcement of which, in our courts, would be of evil example to our citizens. We may suppose the case of an action to recover damages for some failure to perform a recognized duty by the priest or other officials connected with the sacrificial rites of the pagan religion, in some country with which our Republic maintains friendly diplomatic relations, or some proceedings to enforce contracts for the endowment of pagan temples, or the maintenance of the general institutions of the faith of some country not Christian. The trial of such an action would involve, of course, the examination and comprehension, to some extent, by the jury, of the general

subject-matter, which could scarcely fail to produce a corrupting influence upon the citizens of a professedly Christian country.

“The same course of reasoning will illustrate the impropriety of giving relief, by way of action, for the non-performance of contracts made in a foreign country, affecting duties and obligations, when their sense of propriety is in conflict with our own. For instance, contracts for the destruction of one’s parents, or for prostitution, or for the maintenance of fifty wives, which is much of the same character with prostitution, according to our views, may all be held perfectly valid in some countries. We all understand that such has been the case in some countries during the world’s history. Still, no one would expect to maintain an action here founded upon any such consideration. It would be revolting to the public sense.

“The same is true in regard to transactions in conflict with some statutory provisions affecting public police, such as gambling, horse-racing, and the unrestricted sale of ardent spirits, when the transactions forming the basis of the contract, have, in any respect, transpired in this state. So, too, in regard to matters affecting trade and merchandise merely, as the inspection of leather, for instance, the violation of any statutory requirement is sufficient ground for denying all remedy upon contracts based upon such consideration, although the article sold here may be of the most perfect quality, far above the statutory requirement.

“It is now claimed that the requirement of a change of possession in the transfer of personal property, in order to put it beyond the reach of the process of our courts against the former holder, is a matter so far affecting the settled policy of our jurisprudence upon the subject, that it cannot be dispensed with, out of deference or comity to the law of any other state. This case is not as obvious as some of those already stated.

“It does not depend upon the question whether the rule of policy which is contravened by a foreign contract is of a statutory character or one established by the decisions of the courts. It depends upon the point how far it is a matter affecting the settled and uniform policy of the state, so as to be applicable to all similar transactions without the state, something local and permanent, pertaining to the local policy of the forum, which is not transitory, or a thing pertaining to the contract. If it be of this character, it can no more be dispensed with out of deference to the law governing a foreign contract, than could the institutions of religion or the fundamental principles of morality.

“The subject may be illustrated by the contract of sale. The contract itself must be so executed as to be valid by the law of the place where made, in contemplation of the courts. That is commonly the law of the place of the domicile of the seller, unless the contract is made with reference to the law of some other place. It is not always the law of the very place where the contract is in fact made, but the law with reference to which the contract is presumed to have been made, that governs the incidents of the contract itself, and determines their extent and validity. But the contract, when made in conformity to these incidents, will be effectual to transfer the title of things personal, wherever situate, unless it contravenes some requirement of the local law which affects the transfer of all similar property within the jurisdiction. If the requirement affect the

contract merely, as, for instance, that it be in writing or under seal, it will not extend to contracts executed in other states. But if it be something adhering to the property itself, then it will affect all contracts in relation to such property, wherever made. As, for instance, those regulations in regard to assignments for the benefit of creditors, in the act of 1852, if made to apply to all personal property within the state, could not be dispensed with, even in reference to assignments made out of the state. But as they were made to attach only to this particular class of contracts, they are only binding with reference to such contracts made within the state, or by an assignor domiciled within the state at the time.

"There is no doubt this requirement of change of possession is a rule of policy, to a considerable extent, and one which in this state has been regarded of very essential importance to the security of good order and the just rights of our citizens. It is, too, a rule which is made to apply to all personal property which is liable to attachment, whether in the ordinary mode or by process of foreign attachment. There is no other similar requirement which is made to attach to the property, and to all personal property liable to attachment and not to the contract of transfer.

"We say indeed, sometimes, that the sale, without a change in the possession, is not perfected as against creditors. This is not precisely accurate. What we mean is, that the property is still liable to attachment upon process against the former holder, because an act has been omitted which is indispensable to release it from that liability. And this is an act affecting the rights under process only. We thus make the provision virtually a part of the process as to all personal property permanently located in this state, and not by statute exempt from process. It thus becomes a matter governed exclusively by the law of the forum.

"It is true, that out of comity we do not apply it so as to defeat rights acquired in other states, as to property having its locality there. This would be to work fraud and injustice, and offensively to divest rights acquired *bona fide* under the laws of a foreign state. *Taylor v. Boardman*, 25 Vt. 581; *Jones v. Taylor*, 30 Vt. 42.

"The requirement of the statute exempting one's last cow from attachment, was held to be a matter pertaining to the remedy, and as such, extending to all process, whether *mesne* or final, within the state, whether the defendant or debtor resided within the state or not, or whether the property be permanently within the state or only came here casually. *Haskill v. Andros*, 4 Vt. 609. And property exempt by statute from process may be legally transferred, as to all the world, without any change of possession. *Foster v. McGregor*, 11 Vt. 595. This statutory exemption being in effect a part of the process, the requisite change of possession in regard to property not exempt, is thus something affecting the process itself, as it seems to us, rather than the contract of transfer.

"It is not indeed so far a part of the process as to divest rights already acquired in other states, in reference to property casually coming within our jurisdiction. That would be to apply the process to property exempt from its operation, both by the contract of the parties and the law of the place where the property is situated.

“But whether we call it a part of the remedy and a matter pertaining to our process, which to some extent it must be regarded, or call it a universal rule of policy in regard to the transfer of personal property situate within the state and having a place of more or less permanency here at the time of the transfer, so far as the right of attachment is concerned, it has been sufficiently shown already, that the requirement has its chief reference to, and operation upon, the rights of those who desire to attach or levy upon it with a view to enforce legal remedies.

“This view sufficiently disposes of the distinction attempted to be made between the rights of this defendant to hold this property, because of the want of change in the possession, and the case of a strict and technical creditor, which the defendant probably is not, according to the usual definitions of that term. This change of possession is requisite to defeat the right to attach or to levy upon the property, and is not limited to the case of creditors, although in popular language it is more commonly so expressed. Our books abound with the expressions, that a *bona fide* sale without a change of possession is not valid as against creditors. But to be strictly accurate it should be said, that such sales do not prevent the property from being attached upon process against the vendor.

“And that this is the real point of the doctrine is made apparent by the consideration that one may attach property in this state so situated, notwithstanding he may have full notice of the transfer, and have no reason to doubt or question its perfect fairness and adequate consideration. But in regard to subsequent purchasers the rule is otherwise. They cannot ordinarily purchase and hold property, although they first obtain the delivery, if, at the time of the purchase, they had full notice of a *bona fide* sale to another and the payment of the price. Such a purchase is not regarded as *bona fide*. This is certainly the rule of the English law. The statute of the 27 Elizabeth only extends to voluntary conveyances. By the English law, as at present understood, a creditor who has knowledge of a *bona fide* sale of property by his debtor, and the payment of the price, which would change the title as between the parties to the sale, cannot justify attaching the property. But in this state we regard the want of change of possession as a fraud in law, so far as the processes of our courts are concerned. To that extent it is the same as if no sale had been made. And we have applied this rule to all personal chattels remaining within the state at the time of transfer and not exempt from attachment, and to all modes of transfer, whether of the absolute title or the creating of a lien by way of pledge, a mortgage or by assignment for the benefit of creditors. So that it will be necessary to show such change of possession in the present case, in order to enable the plaintiffs to hold the goods against the defendants' attachment. The proof in this case shows merely notice to a third party, in whose possession the assignee had placed the goods, as to that portion of them at New Haven. This would be all that is required by the English law to effect a change of possession. Chitty on Contracts, 412, a. But in this state something more is required. It seems to be indispensable, in order to defeat the right of attachment, that the vendee should, in such case, make the person having the goods in his possession his bailee; that he should consent to hold the goods for him. This might be

inferred, undoubtedly, from the silence of the bailee, if he was requested to keep them for the vendee. But nothing of that appears in the present case. The rule laid down in *Whitney v. Lynde*, 16 Vt. 579, has been always adhered to in this state, so far as I know.

“We are not aware that this rule in regard to the necessity of change of possession, in order to exempt property sold or assigned from attachment, exists, at present, in any other one of the American states. That was the rule in many of them for many years, but after the change of the rule in England it gradually changed in this country, until it has now become universal, out of this state, to regard the want of change of possession, before the attachment, as, at most, presumptive evidence of fraud, and in many of the states, and probably most of them, at the present time, it is merely evidence of fraud. In that view it would not defeat the plaintiff's title that they had not taken possession of the goods before the defendant's attachment, if they could satisfy the jury that the omission to take possession was consistent with the *bona fide* character of the assignment. But with us the decisions have been uniform to require a visible, substantial change of possession to perfect an assignment against attachments, and it has so far become a part of the settled policy of the state, and seems to us so far connected with the remedy, that, as to property within this state, we could not feel called upon to give an assignment for the benefit of creditors, made in another state, priority over an actual attachment of the property by the process of our courts, without such change of possession. Notwithstanding the validity of the foreign assignment to transfer the property here, we must regard it as still liable to be arrested by the process of our courts, until the assignment is carried into effect by the delivery of possession to the assignee, or his taking such possession. This act of possession is a local act, and its validity is to be determined by the law of the place where it occurs. It attaches to the forum rather than the contract, and is a matter affecting local policy, which no rule of comity could fairly justify us in disregarding out of deference to the law of the place of the domicile of the assignor, even if it were shown that the law of New York did not require such delivery in order to perfect the assignment as against attachments. But that does not very clearly appear. It may still be the law of that state that the same change of possession is requisite to perfect an assignment there as here. But it is enough that such is the law here. See the cases on this subject digested in Burrill, chap. xxv.

“In making this discrimination between the contract and the delivery or change of possession, we but carry out the same rule which we should apply to the ordinary contract of sale, where the property was within the state and the owner resided abroad. Any contract of sale valid by the law of the place where made, or where the vendor resided, will transfer the title of the property. But the vendee must here take actual possession, before the property is beyond the reach of process against the vendor. We hold the same in regard to assignments for the benefit of creditors. And we have always applied the same rule in regard to the assignment of choses in action. We do not regard the assignee as having perfected his priority against the process of foreign attachment against the assignor, until he has given notice to the debtor. This is different from the rule which obtains in New York, and in some, probably most, of the other

states. It is there held that the assignment transfers the title, and if it is subsequently attached, by way of foreign attachment, even before notice of the transfer to the debtor, the assignment will take priority, if it be made to appear on trial that the assignment was in point of fact prior to the service of the attachment. But in this state the assignment is only regarded as perfected against attachments when notice is given to the debtor, that being regarded as equivalent to a change of possession, and an indispensable prerequisite, in order to put the property in chos in action beyond the reach of the process of foreign attachment against the assignor. This rule of law, in regard to chos in action attached by process of foreign attachment, has been adhered to with great strictness in this state, from the earliest times. And we are not aware that it has ever been relaxed. It has sometimes been regarded as an anomaly, and the courts have hesitated in regard to it. But upon examination it will be found to form an essential portion of our law, requiring a change of possession to perfect an assignment, as against the process of our courts, in favor of persons having rights of action against the vendor."

CORPORATION HAS NO IMPLIED LIEN UPON STOCK FOR THE PAYMENT
OF DEBTS DUE IT FROM THE HOLDERS.

Massachusetts Iron Co. v. Hooper, 7 Cushing's Reports, 183.

Shares in a corporation are a distinct estate, salable, transferable, and attachable, as personal property, and the corporation has no implied lien on the shares of a stockholder for debts due to the company.

OPINION.

SHAW, C. J. The petitioners, a corporation established by law, apply to this court, exercising the powers vested in them by the insolvent laws, in the nature of a summary proceeding in equity, to revise a decision of the master in chancery, made in the proceedings in insolvency pending before him, in the case of Horace Gray and Nathaniel Francis, insolvent debtors.

The substance of the petition to the master was, that the Massachusetts Iron Company was incorporated by an act passed in March, 1847; that between that time and the actual organization, which took place on the 5th of May, 1847, to wit, on the 26th of March, 1847, it was agreed between said Horace Gray and Benjamin T. Reed and others to accept the act, to fix the amount of the capital stock at \$300,000 and the proportion in which it should be taken and held by the associates, and to organize the corporation

and carry on the business, for which it was established ; that Gray agreed to take 150 shares at \$1,000 each, and the other associates and parties to take severally different sums, amounting in the whole, to \$150,000, being the whole amount ; and it was a part of the agreement, that the company to be organized should purchase, and Gray should sell to them, his estate at South Boston, with the buildings he was then erecting thereon, with fixtures and machinery specified, for the sum of \$200,000, he to complete, finish, and furnish the same in the manner described. It appears that pursuant to this agreement, the company was organized on the 5th of May ; and on the 15th of May, Gray executed a deed conveying the said estate to said corporation, but the buildings, fixtures, and machinery were not then complete ; that the company expended large sums stated, to finish and complete the work Gray had stipulated to do ; also that Gray paid \$130,000 and over towards his shares of \$150,000, but that \$18,000 and more still remained due on the shares, when Gray became insolvent, and these proceedings were instituted, in November, 1847. No certificate of shares had been issued to Gray when he became insolvent. The prayer of the petition of this company to the master was, to have a lien on his shares declared in their favor, not only for the arrears due on the shares, but also for all the sums which they had been compelled to pay, either before or after Gray so became insolvent, to complete the said buildings and furnish the same, which Gray, by virtue of his contract, ought to have done ; and they deny that the assignees, or any other person claiming under Gray, can equitably claim the benefit of such shares, or sell or dispose of the same, until the company are first repaid the sum due to them as aforesaid, and which Gray ought to have paid.

The answer of the assignees admits most of the facts. It admits that the company have a lien on the 150 shares, for the arrears of assessment ; that is, it admits, that the company have the right to sell a sufficient number of said shares to pay those arrears, if not otherwise paid, but denies that such a lien can be declared or enforced by this process. It denies that the company can claim a lien, in any form, on these shares for any sums due the company by contract ; it denies that the company was a party in form to the agreement referred to, which preceded the organization, and insists that whatever balance is due from Gray to the company, is a debt to be proved in common form.

The master decided against the allowance of the petition ; and this is a petition to this court in nature of an appeal from that decision.¹

The first ground of objection to the petition is, that the company have proved no debt against the insolvents, and are therefore not creditors entitled to prosecute this petition. But we can perceive no force in this objection. The petitioners describe themselves as creditors standing in a particular relation, holding claims which they insist are not to be proved as ordinary debts, but to be provided for out of a particular fund indicated ; and the very purpose of their application is, to call on the court to decide whether they are not so entitled to claim.

2. The next question arises upon the effect of the agreement entered into before the organization, and specially set forth and annexed to the petition. This was an agreement amongst eleven individuals, of whom Gray was one, to the effect that they would accept the act of incorporation, proceed to act under it, and distribute and hold the stock amongst themselves, to the amount and in the proportions stated. The court are of opinion, that this was an agreement of the individuals with each other, in regard to the taking and apportionment of shares in the capital, to which the company was not a party. This agreement had its full completion in the organization of the company ; or, if there was any failure, the remedy was to be sought against those who failed of performance, by those with whom the contract was made. The rights and liabilities of the parties to and amongst each other, and of each with the corporation after the organization, depended upon the relation subsisting between the corporation and its members. The agreement did not contemplate a partnership in any event. If it was carried into effect, and a corporation was organized, their rights would then be determined by the law regulating corporations. If not carried into effect, and no corporation should be organized, the agreement would be void.

3. The question then arises, whether this preliminary agreement, made amongst and between the individuals before the organization, could be so far regarded as a contract with the company when incorporated, that they could maintain any suit at law or in

¹ The petitioners' counsel cited *West v. Skip*, 1 Ves. Sen. 239, 242 ; *Dyer v. Clark*, 5 Met. 572, 575 ; *Collyer on Partn.* (Perk. ed.) § 125 ; *Foss v. Harbottle*, 2 Hare, 461, 489 ; *Parsons v. Spooner*, 5 Hare, 102, 109 ; *Gray v. Portland Bank*, 3 Mass. 364, 379.

equity upon it? But it seems not necessary to decide that question; because, supposing the agreement made after the organization of the company, could it be enforced as an agreement with them? It appears to us quite clear, that it was an executory agreement only, resting in provisions, for which Gray may perhaps have been liable on his personal responsibility; but it created no lien on his shares. The shares did not then exist; he had a right, as between him and his associates, to have the shares assigned; but the shares did not exist as property until the company was organized and the shares were assigned to and accepted by him.

Had these persons, by their agreement, proposed to form a partnership instead of a corporation, there might have been in effect a lien upon the shares in favor of the partners, before the separate creditors could claim the shares as separate property. This results from the difference in the relations between a partnership and the individuals who compose it, on the one hand, and a corporation and its members, on the other. Upon the separate insolvency of a partner, his assignees commonly claim his interest in the partnership effects, after an account, in which his share in the capital would stand charged with all sums due from him to the firm. He has no share, in fact, until all his dues are paid.

But a corporation is a body politic, and a distinct person in law from all its members, so created for the express purpose of being a distinct and independent existence and capacity in legal contemplation, so that the corporation may contract or be contracted with, sue or be sued, by any one of its members.

In a partnership, the partners own the property specifically, as joint tenants, *per my et per tout*; but in a corporation, no member has any specific interest or right of property in the money, goods, and effects of which its stock is composed; they are the property of the corporation.

Shares in a corporation are regarded as a distinct estate, salable, and transferable, and attachable, as personal property. Banks have sometimes provided, by a special by-law, that all shares of stock shall be deemed hypothecated to the bank for any debt, the bank to hold the shares without a specific pledge. *Nesmith v. Washington Bank*, 6 Pick. 324; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454. The practice usually is, to take a specific pledge. Here there is no suggestion that the shares of the insolvent were pledged by any by-law or any specific pledge. An in-

insurance office has no implied lien on the shares of a stockholder, for debts due the company, and cannot hold them against the purchaser or attaching creditor. *Sargent v. Franklin Ins. Co.*, 8 Pick. 90. We know of no distinction, in this respect, between an insurance company and a manufacturing company.

4. Another ground taken by the petitioners is that, as no scrip or certificate of shares had been issued, Gray had no more than an equitable right to the stock, which could only be enforced by first paying all which was due to the company from him. But the court are of opinion that this is not tenable. Shares are recognized as separate property, assignable and attachable as the distinct property of the owner. An assignment and distribution of shares made by the company and entered on their books, and an assent by the stockholders, especially where that assent has been manifested by the decisive act of paying instalments on them, vests the title in the shareholder. A certificate is evidence only, and not necessary to complete the title. They may be taken and held on execution, though no certificate has issued. *Hussey v. Manufacturers' & Mechanics' Bank*, 10 Pick. 415.

The court are of opinion, that the Massachusetts Iron Company have no lien on the shares of Gray for any balance due, for completing, finishing, and furnishing the mills and works, or for money due on general account; and, therefore, the decree of the master, dismissing their petition, must be affirmed.

RULE OF DAMAGES WHERE CORPORATIONS UNJUSTLY REFUSE TO
TRANSFER STOCK. — TRANSFER OF SHARES, WHAT REQUISITE TO
PERFECT. — WHAT NOTICE REQUIRED OF TRANSFER OF CHOSE IN
ACTION.

Pinkerton v. Manchester and Lawrence Railroad, 42 New Hamp. Reports,
424.

Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and, to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership.

Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in that state, and by proper certifying officers resident therein.

On the transfer of stock, the delivery will not be complete, until an entry of such transfer is made on the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and, if unexplained, conclusive evidence, of a secret trust, and therefore, as matter of law, fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring state, proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor.

But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in that state : *It was held*, that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid.

Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand with interest, and not the value at the time of trial, or at any intermediate period.

OPINION.

BELLOWS, J. This is an action of assumpsit for refusing on demand, to give to the plaintiff a certificate of twenty-nine shares of the stock of the Manchester and Lawrence Railroad, and to pay him the dividends on the same stock.

It appeared that on the eighth day of July, 1854, one Holbrook owned ninety-six shares of that stock, and then transferred them by indorsement on the back of the certificates to the Granite Bank, Boston, of which he was president, as collateral security for his debts to that bank, amounting to over \$100,000.

The certificates were at the same time delivered to the bank, where they remained without any entry of a transfer on the books of the railroad until the third day of the ensuing August, at a little past 2 o'clock P.M., when they were delivered by Holbrook to Moses J. Mandell, who entered the transfer in a book kept by him as transfer agent, at the office of Brown & Sons, in Boston, of which firm said Mandell was a member, and the certificates were surrendered by the bank to Mandell, and new ones issued by him for the same stock to the bank, he being furnished with blank certificates signed by the president and treasurer for such purposes. And by the earliest conveyance Mandell sent the old certificates,

with notice of the transfer, to the office of the railroad at Manchester, which was received there at about eight o'clock in the afternoon of the same third day of August, and afterwards, in September, 1857, a corresponding entry of the transfer was made in the proper books at that office, as of the date of September, 1857.

It also appeared that the treasurer of the railroad corporation, by vote, in June, 1852, was authorized to appoint a transfer agent in Boston, and that on said third day of August, and for some time before, said Mandell was acting as such transfer agent, and was furnished by the corporation with books to be used for that purpose, and with blank certificates signed by the proper officers of the corporation, and to be filled up and used by him in the course of his business as such agent; and it appeared also that what said Mandell did in issuing new certificates and sending notice to the office at Manchester, and entering the transfer on the books kept by him, was in the regular course of his business as such transfer agent, and that the plaintiff was aware of this course of business, and that said Mandell acted as such agent.

It further appeared, that on said third day of August, the plaintiff, a little before noon, went to Mandell's said place of business, to ascertain if Holbrook had transferred his stock, and finding that no transfer had been entered there, he went to Manchester, procured a writ upon a note he held against said Holbrook, and attached his stock in said corporation at eight minutes before 5 o'clock in the afternoon of said August 3, and without any knowledge in him or the officer serving the writ, of any assignment of the stock.

That judgment was obtained in that suit, and twenty-nine shares of that stock sold to the plaintiff to satisfy it, on the twelfth day of July, 1856; the lien acquired by the original attachment having been preserved; and the question is, whether the assignment to the Granite Bank was good against the attaching creditor.

To the regularity of the proceedings upon the attachment and sale upon execution, there is no exception, nor is there any objection to the existence of a *bona fide* debt to the Granite Bank; but the only question is, whether the transfer was so far completed as to be valid against an attaching creditor.

There is nothing either in the charter or by-laws of the corporation, to prescribe or regulate the mode of making a transfer, but it is contended by the plaintiff's counsel, that until it is entered or recorded in the stock books of the corporation kept in this state,

the transfer is not valid as against an attaching creditor. And the argument is put upon two grounds :

I. That by force of the various statutes upon the subject of the evidence of ownership of stock, and the keeping of the records, and the residence of the officers and their duties, such entry or record is necessary to a valid transfer.

II. That to constitute a complete delivery of the stock, such entry and record are necessary, as the natural and recognized *indicia* of ownership, and that without such entry the stock must be deemed to be still in possession of the assignor, which implies a secret trust, and is, therefore, in the judgment of the law, fraudulent and void as to creditors.

In regard to the second ground taken by the plaintiff's counsel, namely, that without such entry or record the possession of the stock cannot be deemed to have been changed, it is alleged in answer by the counsel for the defendant, that the entry or record in the books of the transfer agency was sufficient, and the same as if entered in the books at Manchester ; and it is also suggested that all the possession was given that the nature of the property was capable of, as in case of that of sale of goods at sea.

And it appears that, by the earliest conveyance after the old certificates were surrendered, the new one was sent to the office at Manchester, with notice of the transfer.

Had this been done immediately upon the pledge and transfer recorded in the books at Manchester, a question might have arisen whether the possession was not protected without unreasonable delay, and so as to prevail against an intervening attachment, as in *Ricker v. Cross*, 5 N. H. 570, and in the case of the sale of a ship in a distant port, as in *Putnam v. Dutch*, 8 Mass. 287 ; *Portland Bank v. Stacy*, 4 Mass. 661 ; or abroad or at sea, as in the cases cited in *Ricker v. Cross*, and as in *Cunard v. Atlantic Ins. Co.*, 1 Peters, 384, 449, and *Jay v. Sears*, 9 Pick. 4, and *Bufferton et al. v. Curtis et al.*, 15 Mass. 528, and 1 Smith's Leading Cases, 6, 7.

In this class of cases it may be said that the want of delivery at the time is explained within the principle of *Coburn v. Pickering*, 3 N. H. 415, upon the ground that such delivery was impossible, and therefore the presumption of fraud is repelled. See *Gardner v. Howland*, 2 Pick. 599, and *Peters v. Ballister*, 3 Pick. 495. On this ground a similar doctrine has been held in the case of the sale of a slave too sick to be moved at the moment.

But in the case before us this question does not arise, because the assignment was made on the eighth day of July, and nothing sent to the office until the third day of August, and this we think would not be regarded as using due diligence to perfect the assignment, if such entry and record was necessary. Nor do we think that books of the transfer agent in Boston can be regarded as the records or accounts of the shares or interests of the corporators contemplated by the several statutes, in providing for the means of taxing the several shareholders, enforcing their private liability, or for giving creditors the necessary information to enable them to attach or levy upon the stock. On the contrary, we think it quite clear that the law contemplates the keeping a record of the ownership of the stock in the state, or by an officer resident here, and competent to certify the same. Section 9 of c. 953, Laws of 1850, comp'd St. c. 150, § 67, provides that the treasurer and clerk of railroad corporations shall reside in this state, except where the railroad is part of one created by the acts of two or more states; and this provision is not affected by the fact that the payment of dividends to stockholders is provided for at the place of business of the corporation in this state. The section provides that the clerk and treasurer shall reside "within this state, and all the books, papers, and funds of said corporation, with the foregoing exception, *i.e.* in case of a road in two states, shall be kept therein, or shall provide for the payment of all dividends to the stockholders in this state, at the place of business of the corporation in this state." This alternative provision we think is designed as a substitute for the keeping of funds for the payment of dividends, and the books and papers connected therewith, in this state, and is not to be construed to dispense with the necessity of keeping a record or account of the stock in this state, or of the residence here of the clerk or treasurer. By the Revised Statutes, c. 146, § 13, which is prior to the act in question, no person could be eligible to the office of *clerk* of any corporation unless he was an inhabitant of the state, and it is quite clear, from the whole course of the legislation prior to this law of 1850, that the keeping of the records or accounts of the shares or interests of the corporators, by the treasurer, or other officer in this state, has been steadily contemplated by the legislature. This is manifest by the law requiring the clerk of the corporation to return a list of the stockholders to the town-clerk, under a penalty of fifty dollars; Comp. St. c. 147,

§§ 8-12 ; the provision for the attachment of stock, by leaving a copy of the writ and return with the clerk, treasurer, or cashier ; the provision requiring the officer having the care of the records of stock to exhibit, on demand, to the officer making such attachment, a certificate of the number of shares owned by the debtor, and to exhibit to him such records and documents as may be useful to the officer in discharging his duty, and subjecting him to a penalty and damages for neglect. Comp. St. c. 207, §§ 16-21. So in relation to manufacturing corporations, it is provided, that if the treasurer does not reside within this state, the stock record shall be kept within this state by the clerk.

With these provisions and this policy in view, it will hardly be contended that the alternative provision in regard to the payment of dividends in this state is to be regarded as a substitute for the residence of the clerk and treasurer, and the keeping of the stock record in this state. For it is quite obvious that such provision for the payment of dividends can, in no aspect of the case, be regarded as a substitute for keeping the stock record here, and in the hands of a certifying officer of the corporation.

To authorize a construction that would make this alternative provision a substitute for all the rest, would require language much more explicit than we find there. If, then, an entry of the transfer in the books of the corporation be necessary to a valid transfer as against this plaintiff, we hold that it must be done in the books kept in this state. The question then is, whether such entry is necessary.

In this case both the plaintiff and the Granite Bank were creditors of Holbrook, the former owner of the stock, and both claim under him ; one by sale on execution, the other by voluntary transfer from the debtor.

By the law of New Hampshire, as it has existed ever since 1812, stock in all corporations is subject to attachment and execution, and the question is, whether the transfer was so far perfected as to be valid against the plaintiff's attachment.

In deciding this question it is not material to determine the precise character of this property, whether such stocks be regarded as choses in action or not ; because we are satisfied that it comes within the provisions of the statute of 13 Eliz. c. 5, even if regarded as choses in action.

The terms used in that statute in respect to personal property,

are "*goods and chattels*," but they are construed to embrace things in action as well as in possession. 2 Black. Com. 384, and note, Ford and Sheldon's case, 12 Co. Rep., applying to an act of parliament. *Ryal et al. v. Rowles et al.*, 1 Atk. 164, 182; s. c. 1 Ves. 348, 363, 366, 367, 369, 371. This case involved the construction of the terms "*goods and chattels*," in the statute of 21 James I., relating to conveyances by persons afterwards becoming bankrupt, and it was held that they included a conveyance of a share in a trading concern by one of the partners, and it was expressly held that these terms in an act of parliament would include choses in action.

And such, we think, has been the doctrine of the courts in this state, as shown in cases of foreign attachment and otherwise. *Hutchins v. Sprague*, 4 N. H. 469; *Giddings v. Colman et al.* 12 N. H. 153; *Langley v. Berry*, 14 N. H. 82. See *Newman v. Bagley & Tr.*, 16 Pick. 570; and *Richmondville Manufacturing Co. v. Pratt et al.*, 9 Conn. 487.

The claim of the Granite Bank arises from what must be regarded as a pledge, and, to be valid, a delivery is essential at least as against creditors.

To constitute such delivery the assignee should be clothed with the usual marks and indications of ownership.

In the case of things in possession, there should be a manual delivery and change of possession, or its equivalent.

In the case of things in action, the usual muniments of title should be conferred upon the assignee. As to the former, it is held, that if the articles are bulky, the delivery of the key of the warehouse in which they are deposited, will suffice.

Ryal v. Rowles, 1 Ves. 362. See *Patten v. Smith*, 5 Conn. 200.

So in case of the sale of goods at sea, a transfer of the bill of lading by indorsement, is, by the commercial law, valid as to creditors.

Caldwell v. Ball, 1 T. R. 205, 215; *Conard v. Atlantic Ins. Co.*, 1 Peters, 444, and cases cited; *Lanfear v. Sumner*, 17 Mass. 112.

A bill of lading is an acknowledgment under the hand of the captain, that he has received the goods and will deliver them to the person named therein, and by the well-settled principles of the commercial law is assignable, by indorsement, and this is equivalent to the actual delivery of the goods.

Such transfer is the ordinary and appropriate mode of selling goods at sea ; and it was held in *Caldwell v. Ball*, 1 T. R. 205, 215, that where two bills of lading were signed by the same captain, the person to whom one was first transferred would hold the goods. So where the goods sold are in the custody of another, and an order is given to the depositary to deliver them to the buyer, which is presented to him, there the sale is complete.

Plymouth Bank v. Bank of Norfolk, 10 Pick. 459 ; *Tuxworth v. Moore*, 9 Pick. 348.

In the case of real estate mortgaged, and the title deeds are left with the mortgagor, who makes a second mortgage, and delivers the title deeds, the first will, in equity, be postponed to the second : *Ryal v. Rowles*, 1 Ves. 360.

In regard to the assignment of choses in action, as a bond or promissory note, a delivery is essential as against a subsequent assignee, or probably a creditor. *Ryal v. Rowles*, 1 Ves. 348 ; *Ben-net, J.*, p. 362 ; *Parker Baron*, 366, 367.

As to goods and chattels in possession, a substantial change of possession is, by our law, essential where it can be had. The want of it unexplained, is conclusive evidence of a secret trust, and shows the sale to be fraudulent as to creditors.

In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record.

This is indicated by the ordinary course of dealing in such property, and has been assumed in our legislature for many years, and it is manifested in the provisions in regard to returns of stock by the clerks or treasurers for the purposes of taxation ; private liability and attachment, all of which assume that the records will show the ownership of the stock ; and some of which continue the individual liability so long as the returns, based upon such record, remained unchanged.

In respect to manufacturing corporations, by express provisions a transfer of stock avails nothing against an attachment until entered upon the corporation records. So, too, such record is expressly recognized as essential in the certificates used in the transfer of the stock in question.

Until then, the transfer is recorded, or is entered for record, we think there has been no such change of possession as will prevail against an attaching creditor, unless in cases as before suggested, where due diligence has been used to make such record, and the attachment has intervened.

We are aware that choses in action may be transferred by a simple delivery of the evidence of indebtedness, with an indorsement thereon in certain cases; but it will be observed in these cases, that all such changes in the indications of ownership, as the nature of the case will admit, is required. If, therefore, upon the transfer of a bond or bill of exchange, it be retained by the assignor, a subsequent purchaser, without notice, would acquire a good title. Indeed, it may be laid down as a general principle governing the transfer of every species of personal property, that to be good against innocent third persons, such transfer must be accompanied with such change of possession and indications of ownership, as the nature of the thing is capable of. Otherwise the seller is enabled, by means of an apparent ownership, to obtain a fictitious credit, and to deceive both creditors and purchasers. To avoid such consequences the law has always watched such conveyances with extreme solicitude.

In this respect we see no distinction between things in action and things in possession, but for any thing we can see the same general rules must apply to both.

It is true that at common law choses in action were not the subject of attachment or execution, except by the custom of London, and then only when the garnishee lived in the city and the debt arose there: Com. Dig., tit. Attachment, A. D. Nor did it extend to stocks in the East India Company. But now by the laws of New Hampshire, of no distant date, choses in action are made the subject of foreign attachment, and stocks in corporations may now be attached specifically like things in possession.

Under the circumstances, and in view of the rapid increase and the vast amount of such property, it becomes extremely material to make a correct application to this species of property, of the principles which regulate the transfer of other kinds of property. In the case before us, the stock was pledged to the Granite Bank on the eighth day of July, 1854, as collateral security for the owner's indebtedness, by a delivery of the certificates indorsed by him to the bank, of which he was then president, and nothing further was done toward taking possession of the stock until the third day of the following August, when the old certificates were surrendered to the transfer agent, and new ones received by the bank.

The act of transfer by Holbrook must be regarded as done on

the eighth of July, and whatever was done afterwards was the act of the bank ; and the question is, whether due diligence was used by the bank in taking possession of the stock. It may be assumed, that as the transfer was made at a distance from the place where the stock records were kept, a reasonable time should be allowed to communicate with the officer ; but the case finds nothing, and nothing is suggested that could justify a jury in finding that the entry was made in a reasonable time after the act of transfer. There is no suggestion that the communication was made at the earliest convenient opportunity after the transfer on the eighth of July, and if there was a daily mail communication with Manchester there could be no ground to claim that due diligence was used. Nor could the exchange of certificates at the transfer agency be regarded as equivalent to a record, or the entry for that purpose in the office at Manchester. If forwarded by the transfer agent and recorded, it then would be perfected, but we are unable to regard the act of the transfer agent, in respect to the record, as any thing more than the act of a mere agent of the bank.

To give to the notice and entry at the transfer agency the effect of a record or entry upon the stock books of the corporation would, as we think, be contrary to the policy of the law, which requires, as the chief evidence of ownership, the record or entry in the books of the corporation kept in this state. Such a rule is simple and easy of application, and is demanded for the convenience of the corporation and the interests of the stockholders and their creditors.

The transfer agent is in no sense the keeper of the stock record, and notice to him is not notice to the keeper of that record. The case, then, is one where due diligence was not used to take possession of the stock ; but in respect to the creditors of Holbrook it was for nearly one month left in his possession, he retaining, as before, the usual indications of ownership, such as membership of the corporation, and a right to vote on the stock, his private liability for debts, and his liability to be taxed, being for all purposes the ostensible owner of the stock. Indeed, the retaining these evidences of ownership in the case of an absolute sale of the stock, or any transfer which implies a delivery, would be no less inconsistent, and no less indicative of a trust than the retaining possession of goods capable of manual delivery upon an absolute sale. If there be any substantial difference the inconsistency would

be more marked in the case of the stock, inasmuch as in case of goods and chattels which are tangible, it is often convenient to disconnect the use from the ownership for a time; and we are inclined to think that the retention of the possession of goods, which are tangible, would be less likely to mislead creditors and purchasers than the omission to make the proper entry in the stock record on the transfer of stocks. Such a neglect to perfect the transfer of stock as this case discloses, could scarcely fail to excite suspicions as to the existence of a fixed intention to perfect the transfer, at all, at the time it was made. Whatever the fact may be in this case, it is quite apparent that if such transfers are held good as against creditors, it would open a wide field for the mischiefs which are denounced by the statute of 13 Eliz. Especially would it be so in these times, when so large a proportion of all the property of the country is in corporation stocks.

We are brought to the conclusion, that the possession of the stock was not changed, and that no satisfactory explanation for it is given; and that, therefore, there is shown a secret trust, which avoids the transfer as to this plaintiff.

The conclusion we have reached on this point renders it unnecessary to consider the other.

The only question remaining is as to the measure of damages.

The general rule here and elsewhere is, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery.

But a distinction has been made in some jurisdictions, by which, where the price has been paid in advance, the plaintiff has been allowed to elect the value at the time when the property ought to have been delivered, or at the time of trial, or, as some cases hold, the value at any intermediate period.

Such a distinction has been recognized in England and in New York, and in the courts of some other states in the Union, upon the ground that the seller, having got the money of the plaintiff, the latter may be deprived of the means, by the seller's act, of going into the market and purchasing the same property at the then market prices.

In *Shepard v. Johnson*, 2 East, 210, it was held, in an action for not replacing stock loaned at the time appointed, it having afterwards risen, that the measure of damages was the value at the time of trial.

This doctrine, and the reason for it, was recognized in *Gunning v. Wilkinson*, 1 C. & P. 625, which was an action of trover for East India warrants for cotton, which had risen after the conversion. So in *Ganisford v. Carrol et al.*, 2 B. & C. 624; *McArthur v. Ld. Seaforth*, 2 Taunt. 257; *Payne v. Burke*, 2 East, 213; note to *Shepard v. Johnson*; *Downes v. Buck*, 1 Starkie Rep. 318, it was held that plaintiff might estimate his damages at the value of the stock at the time of trial. In *Harrison v. Harrison*, 1 C. & P. 412, on a bond to replace stock, it was held that the value at the time of trial was the measure of damages.

These cases go upon the ground that a judgment for damages, equal to the market value at the time of such judgment, would enable the plaintiff to purchase similar property, and thus operate like a decree for specific performance of the contract.

Mr. Starkie, in his work on Evidence, vol. 3d, 1624, lays it down, that the damages may be the value at the time of delivery or the time of trial, "or, as it seems, on any intermediate day;" but he cites against the rule *McArthur v. Ld. Seaforth*, 2 Taunt. 257.

In 3 Phillips's Evidence, 103, it is said that the plaintiff may elect the value at the time of delivery, or the time of trial, but not, as it seems, upon any intermediate day; and see 1 Saund. on Plead. & Evidence, 377 and 677, and Chitty on Contracts, 393, note 2, by Perkins.

In *Dutch v. Warren*, which is stated in *Moses v. Macfarlan*, 2 Burr. 1010, where there was a contract to deliver stock, the price being paid in advance, held, that the value at the time of the breach was the measure of damages, though less than the sum paid.

So on a loan of stock to be replaced at a certain day, held, that the measure of damages was the value on that day. *Saunders, Kentish & Hawkesly*, 8 T. R. 162. In *West v. Wentworth et al.*, 3 Cowen Rep. 82, it was held, that for the breach of a contract to deliver salt, the price having been paid in advance, the measure of damages was the highest market price between the time the salt was due and the time of trial; and the cases cited to sustain the decision are *Cartelyan v. Lansing*, 2 Caines's Cas. Err. 216, and *Shepard v. Johnson*, 2 East, 211, neither of which goes to that extent.

The case of *Clark v. Pinney*, 7 Cowen, 681, decided by the same Judge, Sutherland, takes the same ground after a review of the

English cases, and these decisions have been followed by the courts of some other states, as in *Bank of Montgomery v. Reese*, 26 Penn. 143, which was an action against the plaintiff in error for wrongfully refusing to allow the defendant in error to subscribe for and receive certain stock in the bank. The court fully recognizes the rule laid down in *West v. Wentworth* and *Clark v. Pinney*, as applicable to stocks, but suggests a different rule in respect to articles which are unlimited in production. The court hold, however, that it is immaterial whether the stock has been paid for or not, but that the rule is the same in either case, and the court cites *Cud v. Rutter*, 1 P. Wms. 570, and note, which holds the same doctrine, as it would seem, where the price was not paid in advance, and citing also *Vaughan v. Wood*, 1 Mylne & Keen, 403. In *West v. Pritchard*, 19 Conn. 212, it was held, that plaintiff was entitled to the value at the time of trial, or at the time appointed for the delivery, and that this rule applies to other personal property as well as stocks, although in *Wells v. Abernethy*, 5 Conn. 227, *Hosmer, C. J.*, had expressed a strong repugnance to the doctrine. *Nandon v. Barlow*, 4 Texas, 289, and *Calvit v. McFadden*, 13 Texas, 324, accord with *West v. Pritchard*, in giving the value at the time of trial. In *Shepard v. Hampton*, 3 Wheat. 200, is a dictum of *Marshall, C. J.* to the effect simply, that he should think the value at the time of delivery would not be the rule where the price was paid in advance, but he does not state what it should be.

On the other hand, the case of *Startup v. Cortuzzi*, 2 Crompton, Meeson & Roscoe, 165, is in opposition to the dicta in *Gainsford v. Carrol*, and to *Clark v. Pinney*, and *West v. Wentworth*. In that case, which was an action for not delivering a cargo of linseed according to a contract of sale, on which the plaintiff had advanced a moiety of the price, Lord Abinger charged the jury that plaintiff was not entitled to damages according to the value at the time of trial, and that it was not like a suit for not replacing stock, — and this was sustained, on motion for a new trial, by the whole court, — there being no evidence that plaintiff had in fact sustained any special damage. See a statement of this case in *Suydam v. Jenkins*, 3 Sandf. Sup. Ct. Rep. 641, where *Duer, J.*, reviews the cases, and holds, in opposition to *West v. Wentworth*, and *Clark v. Pinney*, that the highest intermediate price ought never to be taken as the rule of damages, either in trover or assumpsit, unless it be

shown that the plaintiff *would* (*not* might) have realized that price had the contract been performed.

This case, commencing page 614, is an elaborate review of the cases, and the court hold that the rule of damages must be the same in trespass, trover, replevin, or assumpsit.

Mr. Chancellor Kent, in 2d Com. 648, 480, note, says he does not regard the distinction as to the rule of damages arising from a payment of the price in advance, or not, as well founded or supported; and he says that the value at the time of the breach is a plain, stable, and just rule; and so it seems is the conclusion in Sedgwick on Damages, after a review of the cases, pp. 260-280, 277; and see cases cited in 2 Kent's Com. 648 in note. In *Gray v. Portland Bank*, 3 Mass. 364-390, it was held that the value of the stock at the time of delivery, and not on the day of trial, was the true measure of damages; and the case of *Shepard v. Johnson*, 2 East, 211, is expressly denied. Sedgwick, J., says this rule has been long established and invariably adhered to in Massachusetts. The same rule was applied in *Kennedy v. Whitwell*, 4 Pick. 466, which was in trover, and after the defendant sold the goods for a greater price; but it was held that the value at the time of the conversion was the measure of damages, and so in *Sergeant et al. v. Franklin Insurance Company*, 8 Pick. 90, it was held that the value of the stock at the time it should have been transferred was the rule, and the court adopt the doctrine of *Gray v. Portland Bank*, and *Kennedy v. Whitwell*, and consider this case as standing on the same ground as the conversion of goods; and so is *Henry v. Manufacturers' and Mechanics' Bank*, 10 Pick. 415, where certificates of stock were withheld. In replevin, the value of the property when it ought to have been restored, is the true measure of damages: *Swift v. Barns*, 16 Pick. 194-196; in *Smith v. Dunlop*, 12 Ill. 184, which was much considered, and the English and New York cases examined, the rule in Massachusetts is sustained. In *Hopkins v. Lee*, 6 Wheat. 106, held that the value of the land when it ought to have been conveyed, which was when it was paid for, was the measure of damages. So in *Cox v. Henry*, 32 Penn. St. Rep. 18, which was a contract to convey real estate; the price having been paid in advance, it was held that the value at the time it should have been conveyed is the measure of damages. In *Mitchell v. Gill*, 12 N. H. 390, it was said that the value at the time of the breach is the measure of damages. But this is laid down as a

general proposition, and the distinction arising from previous payment is not adverted to, nor do we find such a distinction recognized in any New Hampshire case. See also *Stephens v. Lyford*, 7 N. H. 360.

There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock.

The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach, and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the property, at the highest market price, between the breach and the time of trial.

But it is equally true, that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases, where the articles to be delivered entered into the common consumption of the country in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye-stuffs, &c.; to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages wholly disproportioned to the injury. For, in most of the cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause by review, new trial, or otherwise; shall there be a different measure of value at each trial?

In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations, and to hold that the damages should be the highest price between the breach and the trial, where there is no reason to suppose that a sale would have been made at that precise time, would also be unjust.

But it may be fairly assumed that a very large proportion of the

stocks purchased are purchased to be sold soon ; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him not indemnity merely, but a power in many instances of unjust extortion, which no court could contemplate without pain. In view of such results the courts in England and New York have been inclined to shrink from the application of that rule in many cases, and it has been held that it would not be applied where the action was not brought in a reasonable time ; and this undoubtedly because of the injustice of allowing the plaintiff to take advantage of the fluctuations of many years. But, even if brought in a reasonable time, and what is a reasonable time is not easy to say, there might be often a lapse of many years before a final trial.

In actions of trover, trespass, and replevin, there would be stronger reasons for the application of such distinction than in cases of contract ; inasmuch as the plaintiff is not only deprived of the use of his property, and the means to replace it, from the avails, but is so deprived by the tort of the defendant.

If then the rule is just, it should be applied in these actions ; the form of the action not being material in this respect — and in jurisdictions where this doctrine is recognized, it has been so applied, as in *Wilson v. Mathews*, 24 Barb. 295 ; and *Greening v. Wilkinson*, 1 C. & P. 625, which was trover for East India war-warrants for cotton. In *Wilson v. Mathews*, the highest market price between the breach and the day of trial was held to be the rule. In this state no such rule has been adopted, and it requires no citation of authorities to show that as applied to actions of trespass, trover, or replevin, it would find no countenance here.

The same reasons which oppose the right of electing the value at any intermediate day, as the rule of damages, apply also to an election between the time of the breach and the time of the trial, and we are disposed to hold the value at the time of the breach, or when the articles ought to have been delivered, as the just and convenient rule.

In accordance with our views is the case of *Wyman v. American Powder Works*, 8 Cush. 168. In that case the corporation refused to give the plaintiff a certificate of shares to which he was entitled, or to recognize him as owner, but sold them to another. And it was decided that the defendant was liable to the value of the

shares at the time of the demand, and interest from that time, and with this decision we are satisfied.

Therefore, after reducing the amount to accord with these views, there should be judgment on the verdict.

The learned judge has discussed the cases so much at length in the foregoing opinion, that little more remains to be said upon the questions involved.

I. The question in regard to what constitutes a delivery of shares in a joint-stock company is liable to arise in so many different forms, that it is difficult to lay down any universal rule upon the subject.

1. The contract, as between the immediate parties, is sufficiently executed, and the title completely passed, as a general thing, by the mere assignment and delivery of the certificate of the shares. *Parker, C. J., in Howe v. Starkweather*, 17 Mass. 240, 244; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 98; *Wilson v. Little*, 2 N.Y. 443. And this may be effected generally by a blank indorsement upon the certificate of shares, which the holder may fill up at his convenience. *Kortright v. Buffalo Com. Bank*, 20 Wendell, 91; *Angell & Ames on Corp.* § 564.

But where the charter of the company, or the general laws of the state, contain any specific restriction or requirement in regard to such transfer, it must be complied with, or the title does not pass. *Fisher v. The Essex Bank*, 5 Gray, 373; *Sabin v. Bank of Woodstock*, 21 Vt. 353, 362; *Pittsburgh & Connellsville Railway v. Clarke*, 29 Penn. State, 146.

2. But, in most of the states, this mere delivery and transfer of the certificate of shares will not be regarded as sufficient notice of the transfer, as to creditors and subsequent purchasers, who have *bona fide* acquired title in ignorance of the former transfer. For that purpose some notice given at the place where inquiries in regard to the title of the shares would most likely be made, seems to be required. This is the more common mode of effecting the delivery of choses in action.

Thus, notice to the trustees of equitable property, by the rules of equity jurisprudence, as administered in the English courts, gives a priority over an earlier assignment without such notice. 1 Story Eq. Ju. § 421 b; *Foster v. Blackstone*, 1 My. & Keen, 297; *Timson v. Ramsbottom*, 2 Keen, 35. In *Dearle v. Hall*, 3 Russ. 1, Lord *Lyndhurst* said, "In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of a fund becomes a trustee for the assignee who has given him notice." A different rule prevails in the State of New York; but it is not regarded as resting upon any satisfactory foundation. 1 Story Eq. Ju. § 421 c, and cases cited.

3. It is upon this ground mainly, we apprehend, that notice is required to be given of the transfer of shares in joint-stock companies at the office where the principal records of title in the capital stock is kept; since the company itself being a mere trustee of the capital stock for the shareholders, notice to them will perfect the delivery of the equitable title to the shares; and being a trust, which is always a mere equity, it is not susceptible of any other than an equi-

table delivery. *Sturges v. Knapp*, 31 Vt. 1, 53. All corporate action, as well that of the directors and agents as of the corporation itself, is but a succession of trusts, in regard to which the creditors of the corporation, in the order of their priority, are the primary, and the shareholders the ultimate, *cestuis que trustent*.

4. If, then, notice is to be given the trustee, in order to perfect the transfer as against creditors and subsequent purchasers, it must be done at the place where such notice is usually received and registered; and it should be in a form to gain credit, and to enable the company to preserve it in their usual mode of preserving such facts, and that is by entry upon their books of transfer, which would bring us to the same result arrived at in the principal case. 1 Story Eq. Jur. § 400 b, and cases cited. This subject of the requisite notice of the transfer of equitable rights and of choses in action, as well as of the delivery of chattels in the keeping of third parties, is considered in the late case of *Rice v. Courtis*, 32 Vt. 460. The rule in Vermont requires more to be done in the case of personal chattels in the possession of third parties, in order to effect a delivery, than in most other states. It requires that the keeper should consent to become the bailee of the purchaser; while, in other states, the notice makes him such bailee; and if, after that, he treat the former owner as still entitled to control the property, he will make himself responsible to the purchaser. *Chitty on Cont.* 406 *et seq.* Cases cited above.

II. In regard to the rule of damages adopted by the court in this case, there can be no question as applicable to the ordinary case of the refusal to deliver articles readily obtainable in the market. The English courts have attempted to make the case of shares in joint-stock companies, and some others, exceptions, and to give such damages as will more completely indemnify the owner for the loss of the article.

1. Equity will decree specific performance of a contract to deliver shares in a joint-stock company, since they may not always be attainable in the market. *Duncuft v. Albrecht*, 12 Simons, 189; *Shaw v. Fisher*, 5 De G. M. & G. 596; Story Eq. Jur. §§ 724, 724 a; *Taylor v. Great Indian Peninsula Railway*, 4 De Gex & Jones, 559; s. c. 5 Jur. (N. S.) 1087. But will not grant such decree for the specific performance of contracts for the delivery of public stock in the national funds, which may always be obtained for the market price. Ante vol. i. § 38, pl. 2, and cases cited in notes.

2. The more usual remedy against the corporation for refusing to allow the transfer of their shares into the name of one who turns out upon the trial to have been the real owner, and entitled to have the shares stand in his name, is by bill in equity. In *Davis v. The Bank of England*, 2 Bing. 393, where the owner of shares in the defendants' company brought an action to recover the value of them, and of the dividends declared upon them, on the ground that the bank had refused to recognize him as the owner, and had suffered them to be transferred into the names of third parties, by virtue of forged powers of attorney, the court said, "We cannot do justice to this plaintiff unless we hold that the stocks are still his," and therefore denied the action for the value of the stocks, but allowed the party to recover the dividends which had been declared and not paid. See also *Taylor v. Great Indian Peninsula Railway*, *supra*.

3. But if the recovery of damages is to be made the equivalent of such stock, as in many cases it is obvious it must be, there seems no other rule so satisfactory as the one here adopted. The idea of giving one the advantage of the rise of the market as long as the action remains undetermined, is certainly a most fanciful conceit, and could only have arisen from regarding the defendant as wholly in the wrong, and thus entitled to demand no favor at the hands of the court. This may do well enough in cases where the party has acted wantonly or in bad faith; but, in the majority of cases, the defendant may well be presumed to have acted in the same good faith as the plaintiff; and if so, there is no reason why he should be mulct in an amount of damages altogether beyond what it is made reasonably certain the other party has suffered by his default. The same view of the general rule of damages is taken in the late case of *Hill v. Smith et al.*, 32 Vt. 433, and there can be no question it is destined to prevail in all the courts of this country.

COLORABLE SUBSCRIPTION AND FRAUDULENT RELINQUISHMENT.

Blodgett v. Morrill, 20 *Vermont Reports*, 509.

In an action upon a subscription to build a meeting-house, against one of an association of subscribers, it is no defence that the defendant was assured by the agent who solicited subscriptions "that he wanted his signature to influence others to sign," and that "he should never be called upon to pay." Nor that another subscriber, who signed previous to the defendant, had been induced to sign by similar assurances given by the agent, but had in fact, upon being required, paid the full amount of his subscription.

OPINION.

REDFIELD, J. This is an action upon a subscription to build a meeting-house. The subscribers seem to have been merely an association, and not a corporation, organized under the statute. There seems to have been a corporation, probably, or an association, existing before this time in the town of Randolph, under the name of the Congregational Society in Randolph. This subscription, however, seems to have been made wholly independent of the society, and not in any sense under the control of the society, except that the house, when rebuilt or repaired, was to be under the *control of that society*.

The testimony offered in defence of the action, that the defendant was induced to sign the subscription only upon the assurance of the agent "that he wanted his signature to influence others to sign," and that "he should never be called upon to pay," is in-

sisted upon in two views. 1. As showing that the defendant never expected to pay the sum subscribed, and that the defendant was only induced to sign the paper upon the assurance that he should not be required to pay. In this view it is directly contradictory to the written stipulation, and could no more be received than parol evidence of a promise not to collect a promissory note, or to accept a less sum, or payment in some different mode from that specified in the contract. It is a proposition so plain, as to require no illustration, in this view. 2. It is urged, that this contract contemplated a fraud upon the other subscribers, and so cannot be enforced. Contracts of that character are sometimes enforced and sometimes not ; but they are never set aside, either in law or equity, on account of the party who was himself consenting to the fraud. He is not deceived. Courts generally so determine suits upon such contracts, as to defeat the contemplated fraud, whether that can best be done by allowing or denying the remedy. Such contracts are always void as to those persons whose rights are attempted to be affected by the fraud. Here the alleged fraud consisted in the agreement not to enforce the subscription. This portion of the contract was in bad faith, it is said. Perhaps it is so. But, if so, the defendant is equally in fault with the agent ; the rest of the association knew nothing of any such secret agreement. The defendant knew the subsequent signers were to be decoyed by his name. Clearly, then, *he* ought to be held to *his* contract. And the only sure mode of defeating the *contemplated fraud* is to compel the defendant to do, as he gave the other members of the association to believe he intended to do ; that is, to make him keep his promise to the sense, as he made it to the sound.

We think, indeed, that it is very doubtful whether this device of having nominal subscriptions, even if the agent had given a writing to that effect, is any such fraud as would release the subsequent subscribers ; each subscription being in its nature an independent contract ; and one having no legal right to depend upon another. We do not say such a fraud would not release those attempted to be misled by it. But clearly the defendant was not deceived, but attempted to deceive others.

This subject may be illustrated by the case of secret contracts between the creditor and the principal, but kept secret from the surety, or guarantor ; such secret contract will release the surety, but still leaves the principal bound, the same as before. So, too, if

A. agree to give B. a certain sum for goods, in advancement of C., any secret agreement between B. and C., that the latter shall pay a farther sum, is void, as a fraud upon A., and B. cannot recover such farther sum. The secret agreement, which is a fraud upon third persons, is held void, and the main contract enforced; so, here, we do the same. *Jackson v. Duchaire*, 3 T. R. 551. The same rule is applied to secret agreements, by which a debtor, in compounding with his creditors, is induced to give a secret contract to pay some more than others. The secret contract is held void; but that does not affect the main contract. In mercy, then, to the defendant, to prevent his accomplishing a contemplated fraud, we think he should be compelled to pay this subscription, so far as this part of the defence is concerned.

3. The third ground of defence, that the agent made a similar agreement with Dr. Pember which was a fraud upon the defendant, is nearly answered by what has been already said. 1. If such contract were no defence for Dr. Pember, the defendant clearly could not complain, unless the agent actually did release the subscription, which is not pretended. 2. The secret agreement was one which could not be enforced, either in law or equity; and so Dr. Pember regarded it, and actually paid his subscription when required. 3. But if it were actually a binding contract, and had been acted upon, and the subscription discharged, it would not, in my mind, be such a fraud as would release the defendant. The essence of the fraud consists in representing, expressly or impliedly, that the subscriptions are *all real*. Now no such representation is claimed as expressly made, and none certainly is implied from the conversation had with the defendant, — but the contrary.

If the defendant were told that his own subscription was a mere sham, to impose upon others, what right had he to expect that it was not so with any one or all of the others, which went before? He might, perhaps, suppose that some were genuine. But why should he be the only decoy used to bait others? He was at least put upon inquiry, and might have asked if the other subscriptions were all genuine. But the case is decided mainly upon the other ground, that Pember's subscription was genuine and binding in law. The Middlebury College cases are totally different. In those cases there was a certain sum to be raised, and then all over that sum was to go to reduce the subscriptions made, — so that each subscriber had an interest in all the others. The persons sued, in

those cases, were not the *decoys*, but the persons *decoyed*, — not the *deceivers*, but the *deceived*. The subscriptions, in those cases, were actually discharged by writing; so that no question arose as to controlling a writing by oral testimony.

Judgment reversed and case remanded.

In *Connecticut & Pass. Rivers R. R. Co. v. Bailey*, 24 Vt. 465, it was held, approving the foregoing case, that parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative, and void, and also that each subscription was an independent contract, and in no way affected by the terms of the others.

In *Penobscot & Kennebec Railroad Co. v. Dunn*, 36 Me. 501, it is queried whether the directors of a corporation have power to release a subscription to the capital stock of the company, without consideration; and if they do possess such power, and the release is optional with the subscriber, he must elect within a reasonable time.

But in *Mann v. Pentz*, 2 Sand. Ch. 257, where the defendant was the purchaser of one hundred shares, par value \$50, on each of which \$32.50 had been paid, and was allowed by the directors to receive certificates for sixty shares in full, and surrendered the balance to the company, — when the corporation subsequently passed into the hands of a receiver, it was held that this action of the directors did not affect the creditors of the company, or other stockholders who did not assent to the arrangement, and the law required him to make the whole full stock, if that be necessary for the discharge of the corporate liabilities. See also *ante*, vol. i. 159.

WHERE STOCK IS LIMITED SUBSCRIBERS ARE BOUND TO PAY FULL AMOUNT SUBSCRIBED. — MODE OF ENFORCING PAYMENT OF SUBSCRIPTIONS.

The Hartford and New Haven Railroad Co. v. Kennedy, 12 Connecticut Reports, 499.

Where the defendant with others signed a writing in these words: "We do hereby subscribe to the stock of said railroad the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned in the charter;" it was held, that from the relation of stockholder and company thus created, a promise by the defendant was implied to pay such instalments as the directors should order; and 2d, that a clause in the charter authorizing a sale of the stock of delinquent stockholders was cumulative merely, leaving such promise in full force.

The rule that where a statute creates an offence unknown to the common law, and in the enacting or prohibitory clause points out the mode of proceeding under it, that mode alone can be pursued, is not applicable to beneficial statutes in civil cases.

OPINION.

HUNTINGTON, J. This is an action of assumpsit, brought to recover of the defendant, an original and continuing stockholder in the Hartford and New Haven Railroad Company, the amount of instalments due upon his stock, and ordered to be paid, by the directors of the company, in pursuance of the provisions of the act of incorporation. The defendant resists payment, on the ground that he has made no promise, express or implied, to pay the sums demanded; and that the only remedy for the plaintiffs, on his failure to comply with the order of the directors, is to sell the stock and apply the proceeds to the payment of the instalments which are due. An answer to a single inquiry, disposes of the principal and most important point in the present case. Did the defendant, by becoming and continuing a stockholder in this company, incur a personal obligation to pay the instalments required by the directors, in the manner prescribed by the charter, on the shares of stock by him originally subscribed, and held by him, at the time such instalments were called for and were due? We think such an obligation was created, and that the law coinciding, in this case, with justice and good faith, will enforce it. It is true a promise to pay, in *precise terms*, does not appear to have been made. The defendant has not affixed his signature to an instrument, which contains the words *I promise to pay*; but he has done an equivalent act. He has contracted with the plaintiffs to become a member of their corporation, and to be interested in their stock to the extent of one hundred dollars for each share assigned to him, if that amount be required. This contract has been executed on the part of the plaintiffs. The shares which he has agreed to take, and for which a certificate of stock has been delivered to him, are part of a moneyed capital. They are to be paid for in money, and by voluntarily becoming a member of the corporation under the provisions of this charter, an implied assumpsit arises to pay the instalments, on the terms, conditions, and limitations mentioned in the charter. This, we think, will be very apparent, when the object for which this corporation was created, and the several provisions in the act, are carefully examined and considered. We concur in the position advanced by the counsel for the defendant, that corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the

statute. *Head v. Providence Insurance Co.*, 2 Cranch, 127; *Bank of the United States v. Dandridge et al.*, 12 Wheat. 64. And we shall apply this legal principle to the case before us.

This company was formed for the purpose of raising the necessary funds in money, to prosecute and complete a work of great public utility. This could be done only by a solid capital of large amount, to be created by the voluntary subscription of individuals, in the form of stock, and to be paid, from time to time, as the exigencies of the work might demand. The regular and prompt payment of the sums required, if not indispensable, was important to the successful issue of the undertaking, and was the means by which the debts of the company were to be discharged. It could not but have been foreseen, by the stockholders, that in carrying on such an enterprise the agents of the corporation would be compelled to enter into heavy responsibilities for work and labor to be done and materials to be furnished, and to incur other necessary expenses; and it was as clearly foreseen that these could be discharged and paid only by the payment in money for the stock received from the company. When, therefore, the subscribers associated under the act, and became stockholders to effect this object, and which could be accomplished only by the advance of money in payment of the instalments, it seems difficult to give any other legal meaning to their act than that it was equivalent to an express promise on the part of the stockholders to pay their respective proportions of the capital when lawfully demanded. Such a construction of their engagement harmonizes with the entire design of their association, is in furtherance of its object, does no injustice to the stockholders, and affords all the security which can reasonably be required by the public, or the creditors of the corporation, that the object will be consummated and the debts of the company faithfully discharged.

To constitute a promise or undertaking no precise form of words is necessary. No technical language is required. It is often implied from the terms used in connection with the object of the parties. *Earl of Shrewsbury v. Gould*, 2 Barn. & Ald. 487; *Webb v. Plummer*, id. 746; *Randall v. Lynch*, 12 East, 179. In the case of *Marzetti v. Williams et al.*, 1 B. & Ad. 415, it is said the only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. The one

is established by the express words used by the parties ; the other by circumstances showing that the parties *intended* to contract.

We think that in the present case the inference is just, that the subscribers intended to hold themselves responsible for the payment of the assessments upon their stock, when the same should be legally demanded. We have said this inference may fairly be drawn from the object for which the corporation was created, and the manner in which it was carried into effect. The object was the completion of the railroad ; the manner, by creating a substantial capital stock to be paid in money whenever it was needed. If such payment cannot be enforced it is obvious the capital stock required by the charter may not, and probably would not, be obtained. It may be subscribed, but if the payments may be lawfully withheld, the stock is only nominally created, and on this hypothesis we are to understand the legislature, when they enacted, that the capital stock of the company should consist of five hundred thousand dollars, with the privilege of increasing it to one million of dollars, to be divided into shares of one hundred dollars each, meant nothing more than that there should be a nominal capital of this amount, leaving it optional with the subscribers to pay or not, as might best suit their interest or convenience. We should hesitate long before we affixed this meaning to the act ; a meaning which, in its practical results, might operate as a fraud upon the public, the corporation, and individuals.

This view of the legal effect of the act of the defendant in becoming a stockholder, is much strengthened by other considerations, to which we propose to refer. The corporation was vested with power to create a capital stock, to fulfil the objects of the incorporation, or perhaps more properly speaking, the act directed what should constitute the stock, and the manner in which it should be created. It was to consist of at least five thousand shares, of the value of one hundred dollars each. The corporation then proposed to each subscriber, to sell him shares of the stock, at the price of one hundred dollars for each share. This offer was accepted by the subscribers ; and such acceptance, by legal implication, amounted to a promise, and created an obligation, on the part of the stockholders, to pay for them the price agreed, when the same might be lawfully required of them by the directors.

This was the legal purport of the transaction, divested of the particular form which it assumed. *Spear v. Crawford*, 14 Wend.

20. The true construction of this charter ought not to depend merely upon the form of the proceedings under it ; but the substance of those proceedings should be regarded in connection with the object to be promoted. The same rules of construction apply to this, as are applicable to every other instrument. It was certainly competent for the corporation to contract with the stockholders as individuals. *Dunstan v. Imp. Gas-Light Co.*, 3 B. & Adol. 125, per *Parke*, J. ; *Hill v. Waterworks Co.*, 5 B. & Adol. 866. They might prescribe the terms, not inconsistent with the provisions of the charter, upon which all persons should become members of their association. They had the power to declare the conditions upon which individuals might become proprietors of their stock, subject, however, to the provisions of the act of incorporation. *Harlaem Canal Co. v. Seixas*, 2 Hall, 504. Hence, it has never been doubted, that the corporation had authority "to receive of the members promises for the payment of assessments [instalments], upon which the corporation would have a cumulative remedy, and be enabled to compel the payment of them in a personal action ; and that when, upon the faith of these promises, the corporation proceed in their undertaking, there is then a sufficient consideration on their part, and they may lawfully compel the payment, not only by selling the shares of delinquents, but also by enforcing the performance of collateral engagements and promises." *Middlesex Turnpike Corporation v. Swan*, 10 Mass. 384. The reasonable doctrine is here asserted, that an express promise to pay the instalments on stock is founded on sufficient consideration, and presupposes a power both in the corporation and the stockholder, to make a valid contract regarding the stock ;—a power, in one, to sell it, and in the other, to bind himself to receive and pay for it. We are unable to discover the slightest difference, in principle, between the case of an individual who voluntarily becomes a stockholder, by agreeing to receive, and actually receiving, the stock, consisting in money, without superadding a promise in terms to pay for it, and one where such promise is expressly made. In both cases, the corporation contract to sell or transfer to the stockholder a specified interest in their corporate funds, called shares ; in both the stockholder agrees to receive it ; in both there is the same legal consideration,—on the part of the corporation, the expenses incurred by them, and a reliance upon the engagement that the instalments will be paid to enable them to

proceed in their undertaking;—on the part of the stockholder, the benefit received by him, by his interest in the road, and his right to receive a proportion of the profits of the enterprise.

Additional evidence of the intention of the legislature to create a personal liability upon the stockholders, and of the same intention on the part of the stockholders themselves, is derived from other parts of the charter, and from the terms of subscription, and the certificates of stock. The charter was granted, not merely for the benefit of the owners of the stock, with liberty to them to pay for it or not, as they chose. It was not for their private advantage merely, that they were authorized to enter and possess themselves of lands of others, over which the road was located; nor was their interest alone consulted, when their corporate powers were declared forfeited, unless the sum of one hundred thousand dollars was expended upon the road within four years, or if the road was not completed and put in operation within six years from the passage of the act. The legislature had in view the public interest, and the security of those who might contract with the corporation. *Lees et al. v. Canal Co.*, 11 East, 645. Under this act, the proprietors have rights, the public have rights, and creditors, if there be any, have rights; all of which are to be protected. The power given to the corporation over delinquent stockholders who come in by their voluntary act, was intended to be such as to furnish as adequate security as was deemed necessary, that the work should be completed; that funds should be obtained, to prevent a forfeiture of the charter, by a failure to comply with the stipulated conditions, and that the creditors of the corporation should be paid. This security can be considered perfect and complete, only by giving that construction to the act of the individual which constitutes him a stockholder, which we think it plainly imports,—a promise to pay the legal assessments, when called for. It was very properly said by the court, in the case of *Worcester Turnpike v. Willard*, 5 Mass. 80, that “the indemnity which a turnpike corporation can, by the statute creating it, claim for the expenses of locating and making the turnpike, arises wholly from the legal toll to be received. And after it is created with all the necessary powers, it may be very uncertain whether the indemnity will be sufficient, as the expenses and the toll are each uncertain; and the directors can have no funds to enable them to contract with or pay the workmen, but the value of the shares when sold, unless they

bind themselves personally to the payment. This cannot reasonably be expected from them, without some further security from the proprietors than the value of their shares, which in fact may be equal to the reimbursement. This further security is, therefore, a reasonable one, and of convenience to the public, so far as turnpikes are a common benefit. There is no legal objection to a contract between the corporation and the individual members of it, more than between a town and any of its inhabitants when the authority of the corporation to contract with its members is within the reason of the powers vested in it, and may be necessary for their execution, although this authority may not be expressly given, by the incorporating act, or by any other statute."

The subscription for the defendant was in the following words: "Whereas the General Assembly of the State of Connecticut, at their session in May, 1833, passed a resolution to incorporate the Hartford and New Haven Railroad Company, with power to construct a railroad or way, from the town of Hartford to the city of New Haven — We do hereby subscribe to the stock of said railroad, the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned in said resolution." One of these conditions is, that the stock shall amount to a real capital of at least five hundred thousand dollars, if necessary for the completion of the work, not a nominal capital merely, or none at all, at the pleasure of the stockholders. One of the limitations is, that no stockholder shall be compelled to pay more than one hundred dollars for each share; and one of the terms is, that the directors may require the payment of the sum or sums subscribed to the capital stock of the company, at such times, and in such proportions, and upon such conditions, as they may deem fit. By the act of subscribing for and receiving stock, the defendant, as a stockholder, voluntarily associated with others to raise his proportion of the sum of five hundred thousand dollars, as it might from time to time be wanted, and subjected himself to the requisition of the directors in relation to the payment of instalments. This was a voluntary act on his part. It was an assent to perform what was required of him by the directors, within the terms of the charter. It was a promise to pay in money the amount which he subscribed to pay. Hence the peculiar fitness of the expression in the act of incorporation, "the directors may *require the payment* of the sum or sums subscribed to the capital

stock," and on failure or neglect to make *payment* pursuant to the requisition of the board of directors, the stock of delinquent stockholders, or so much thereof as may be necessary, may be sold by the directors, after the lapse of six months from the time the *payment becomes due*; and the surplus, the avails of such sale, after deducting the *payments due*, and *interest* thereof, and the necessary expenses of sale, shall be paid over to such negligent stockholders. This section of the charter, which, by reference, is made part of the subscription of the defendant, points very distinctly to a personal liability on the part of the stockholders. "*The directors may require payment.*" Requiring payment, as the term is here used, is equivalent to demanding payment; and if the act of incorporation authorizes a demand of payment, it necessarily confers a legal right to insist upon the performance of the thing demanded; and such a right of course implies the additional right to the aid of the ordinary process of the law to enforce it, unless it be taken away or controlled by other provisions in the charter. Whenever a statute gives or provides any thing, the common law provides all necessary remedies and requisites. *The Protector v. Ashfield*, Hard. 62. When, therefore, the defendant affixed his signature to the subscription, by which he freely gave the directors power to demand payment of the instalments, he virtually subjected himself to the legal consequences which would result from a failure to pay money which he had given them authority to require him to pay. He made himself amenable to compulsory process to enforce payment. The section also speaks of "*the payment becoming due.*" Unless a promise to pay may be implied from the act of the defendant and the relation which he sustains to the corporation as a stockholder, it is not easy to perceive that any payment is demandable, or is due. To say a sum of money may be lawfully demanded, and that it is due, when the person of whom the demand is made may make the payment or withhold it, at his pleasure, — may treat it as due or not, according to his good pleasure, — would be a gross perversion of language, and stultify both the legislature who authorized the directors to make demand of the moneys subscribed, and the individual who voluntarily assented to be subject to the exercise of that authority. We are to understand the language used, according to its plain, obvious meaning. It is not to receive any strained interpretation or forced construction; and when understood in its ordinary and familiar signification and import, and ac-

according to its general and popular use, it cannot be doubted that the acknowledgment of a debt due for instalments of stock and of the right to demand payment of them, is equivalent to a promise to pay, which the law will enforce. *Kellogg v. Union Company*, 12 Conn. 7. Is there any substantial difference between such acknowledgment and one expressed in these words: "Due A. B. 100 dollars, on demand," which has been held to import an express promise to pay on demand? *Smith et al. v. Allen*, 5 Day, 337. Or "Due A. B. \$325, payable on demand," which, it has been decided, is a promissory note within the statute; the acknowledgment of indebtedness on its face implying a promise to pay on demand? *Kimball et al. v. Huntington*, 10 Wend. 675. Or "I. O. U. 100L.," which is evidence in support of a count in assumpsit for money lent, of an acknowledgment of a debt? *Fisher v. Leslie*, 1 Espinasse, 426; *Israel v. Israel*, 2 Campb. 499; *Childers v. Boulnois*, Dowl. & Ryl. N. P. Ca. 8; *Robarts v. Robarts*, 1 Mo. & Pay. 487. So also the stock may be sold for the *interest* on the payments due. Interest is given as damages for the detention of a debt, or the non-performance of a contract. It is difficult to discover by what rule of equity interest can be required to be paid, where there has been no default of payment of principal,—where there is no debt due nor any contract unperformed. If there was no personal obligation to pay the instalments, the stockholder has been in no default. He has not neglected to pay a legal debt, nor failed to discharge a valid agreement. And why should interest be charged on that which is no debt, and which could not be enforced by a court of law or chancery?

The certificates given by the company and accepted by the stockholders, furnish still further evidence of their intention to become personally liable to pay the instalments. They declare in effect, among other things, that the residue of the sums due on the stock is payable by instalments as may be ordered by the board of directors. No language could more fully admit a liability to make payments when ordered; and if it exist, it would seem that it must arise from the promise implied in the relation of stockholder and company under this charter,—a relation created by the voluntary act of the parties.

It seems to us, also, that the intention of the legislature to impose a personal liability upon the stockholders for the assessments which are ordered, is fairly to be inferred from the consideration,

that, had no authority been given to sell the shares of delinquent proprietors, such liability would have been created ; otherwise, the whole object of the act of incorporation might be defeated, and a wide door opened to the perpetration of the grossest frauds upon the corporation and their *bona fide* creditors. If the charter made no provision for the sale of the shares, and all the other provisions had been retained, could any reasonable doubt be entertained that the stockholders would have been personally liable to pay the instalments ? Would not the law raise a promise to pay, from their engagement to take the stock at a certain value, and the authority given to the directors, both by the charter and by the stockholders, to require payment ? Is it to be presumed that the legislature intended to create a corporation, with a solid, fixed capital, to consist of stock in shares of a certain value ; with power to demand payment for it of those who voluntarily became stockholders under the provisions of the charter ; with authority to do every thing necessary to effect the object of the incorporation ; to possess themselves of the lands of third persons ; to contract debts of an indefinite amount, and yet with permission to the proprietors to withhold payment if they pleased, and thus enable them to defeat the object of the act, and defraud innocent persons ? If the legislature, upon the application of this company, had assisted them, by an issue of state stock, to be sold for their benefit ; or had advanced moneys in aid of their enterprise ; or had authorized a subscription to the capital stock in behalf of the state, on which the instalments had been regularly paid ; would it not be a perversion of the spirit and words of the charter, as well as a fraud on the state, so to construe the act of incorporation, as to allow the private stockholders the benefit of these funds, and exonerate them from personal liability for their instalments ? We think it very clear that, aside from the clause authorizing the sale of the shares of negligent proprietors, the relation of stockholder and company, as created, under this charter, implies a promise to pay for the stock.

Perhaps it is not unreasonable to infer such to have been the opinion of the Supreme Court of Massachusetts, both from their adoption and application of a rule, that where a statute gives a new power, and at the same time provides the means of executing it, it can be executed in no other way, and from the language used by *Sewall, J.*, in giving the opinion of the court in the case of *Middlesex Turnpike Corporation v. Swan*, 10 Mass. 384. Referring to

the case of the Andover and Medford Turnpike *v.* Gould, 6 Mass. 45, which is the first case in which such a rule was applied, directly, to a turnpike corporation, he says: "The statute which created the power of assessing, also ascertained the remedy to compel the payment of assessments; and no implied promise or personal duty results from a consent to become a proprietor of shares in a turnpike, *where the corporation is established with the power and remedy of assessments.*" If no such power and remedy were provided, would the court have said no implied promise would have resulted from becoming a stockholder?

If, therefore, without the clause giving the directors power to sell the stock of delinquent stockholders, a promise would have been implied to pay the instalments, the only remaining inquiry is, ought this clause so to operate as to rebut this implication? Is the remedy which it provides cumulative merely, leaving the promise in full force, or does it abrogate the promise which is implied in voluntarily becoming stockholders in the company? This inquiry we propose to answer.

The argument of the defendant has proceeded mainly upon the ground that it is by virtue of the 13th section alone (which gives the authority to sell) that *any* remedy exists to enforce the payment of instalments. We have already examined this argument; and we think it unsupported, by any fair construction of which the act of incorporation is susceptible. The views we have expressed on this point, are believed to be eminently just, and in accordance with the spirit and fair meaning of the plaintiff's charter, and the act of the defendant voluntarily becoming a stockholder and subjecting himself to all the obligations imposed by the act of incorporation. We think, also, they are sustained by high authority. *Union Turnpike Co. v. Jenkins*, 1 Caines, 380; s. c. 1 Caines's Ca. in Err. 86; *Spear v. Crawford*, 14 Wend. 20; *Bear Camp River Co. v. Woodman*, 2 Greenl. 404; *Instone v. Frankfort Bridge Co.*, 2 Bibb, 576; *Mayor, &c. of Baltimore v. Howard*, 6 Harris & Johns. 383; *Dugan v. Mayor, &c. of Baltimore*, 1 Gill & Johns. 499; *Bergen v. Clarkson*, 1 Halst. 352; *Bond v. Susquehannah Bridge and Banking Company*, 6 Harr. & Johns. 128.

The counsel for the defendant, in the course of the argument addressed to us, have insisted, that whatever personal obligations might have been incurred under this charter, on the part of the stockholders, had not a specific remedy been provided for their

defaults; yet that the 13th section, which gives authority to sell the shares of negligent stockholders, is the only remedy which can be pursued, and excludes the responsibility which the common law would otherwise have implied and enforced. We have heretofore adverted to this section for another purpose, and shall now consider it more particularly with reference to the inference drawn from it, by the defendant. This duty is imposed upon us, as well from the importance of the principle assumed, as from the great respectability of the precedents which have been cited in its support. The section is in these words: "That the directors of said company may require 'the payment of the sum or sums subscribed to the capital stock of said company, at such times, and in such proportions, and upon such conditions, as they may deem fit; and in case any stockholder shall refuse or neglect to make payment pursuant to the requisition of the board of directors, the stock of such stockholder, or so much thereof as shall be necessary, may be sold by the directors of said corporation, at public auction, after the lapse of six months from the time when the payment became due; and all surplus money the avails of such sale, after deducting the payments due, and interest thereof, and the necessary expenses of the sale, shall be paid over to such negligent stockholder.'" The position advanced and applied to the case before us is, that when a statute gives a new power, and, at the same time, provides the means of executing it, those who claim the power can exercise it in no other way. If a power is created in the plaintiffs to direct the instalments to be paid, they can enforce the payment in the method directed by the act of incorporation, and not otherwise; and that method is by the sale of the delinquent's shares. Such a position we find stated in several cases decided by the Supreme Court of Massachusetts, and is supposed to be the basis of several decisions by that court, in which it has been held, that where certain corporations were created with the powers and privileges, and subject to the duties contained in the statutes defining the general powers and duties of such corporations; and where the only remedy provided by the statutes for the collection of the assessments upon the shares, when payment is neglected, is by sale of them; that remedy alone can be pursued, unless there be an express agreement to pay them. These precedents have been followed by the Supreme Courts of Maine and New Hampshire. *Andover and Medford Turnpike Corporation v. Gould*, 6 Mass. 40; *Idem v. Hay*, 7 Mass.

102; New Bedford and Bridgewater Turnpike Corporation v. Adams, 8 Mass. 138; Middlesex Turnpike Corporation v. Swan, 10 Mass. 384; Franklin Glass Company v. White, 14 Mass. 286; Chester Glass Company v. Dewey, 16 Mass. 94; Salem Mill Dam Corporation v. Ropes, 6 Pick. 23; Proprietors of Newburyport Bridge v. Story, 6 Pick. 45, *in notis*; Ripley v. Sampson *et al.*, 10 Pick. 371; Cutler v. Middlesex Factory Company, 14 Pick. 483; 3 Fairfield, 588; Franklin Glass Company v. Alexander, 2 N. H. 380. These decisions emanate from high authority, and are entitled to great respect. We are far from being satisfied that they are applicable to the case before us.

In the case of Andover and Medford Turnpike Corporation v. Gould, 6 Mass. 43, it is said the tenth section of the Massachusetts act enacts, that whenever any proprietor shall neglect or refuse to pay a tax or assessment agreed on by the corporation, to their treasurer, in sixty days after the time set for payment, the treasurer may sell the share of the delinquent proprietor at public auction for the payment of the tax and the charges of sale. The words of this section are not as strongly indicative of the intention of the legislature to create a personal obligation to pay the assessment, as those of the 13th section of the plaintiffs' charter. They give no authority, in terms, to *demand* payment; nor do they refer to the assessment as a *debt due* and recoverable. They rather imply, perhaps, that no debt was intended to be created by becoming a stockholder; and that, if a tax is assessed, it is to be collected only by a sale of the shares. Hence the general act relating to turnpike corporations is considered as bearing a strong analogy, in this particular, to the acts authorizing the collection of county, town, and society taxes, and taxes laid by the proprietors of common fields. Andover and Medford Turnpike Corporation v. Gould, 6 Mass. 40; Gedney v. Tewksbury, 3 Mass. 307. In the act incorporating the plaintiffs, express authority is given to demand and require payment of the instalments. They are considered as debts due and unpaid; and the neglect or refusal to discharge the obligation to make payment, authorizes the use of the additional remedy of a sale of the shares.

It is supposed there are other broad lines of distinction between the act which has received a judicial construction in the first case cited from Massachusetts, and the act on which the plaintiffs' right to maintain this action is founded. It is understood that in the

former the amount of the capital to be invested is not fixed by the legislature. It is, to some extent at least, dependent upon the will of the corporation. The power to make assessments is not expressly given, by the act defining the general powers and duties of turnpike corporations, but is only implied from the authority given in the tenth section of the act, to sell the shares of delinquent proprietors. *Andover and Medford Turn. Corp. v. Gould*, 6 Mass. 43, 44. The discretionary power of these companies to create a large or a small capital, as their interest may require, coupled with the fact that the power to order any assessment arises solely by implication from the authority given to make sale of the shares, may, possibly, justify the inference that "the legislature considered such sale as an adequate remedy to recover the assessments." The shares are not valued at any given sum in this act. They are not a part of any definite fixed capital required by law. No assessment can be made upon them, by virtue of an express statute enactment. The corporation have power to agree on a tax of the shares of the proprietors; but this power is only inferred from the authority given to sell, on failure to pay the tax. When, therefore, the legislature have not thought the public interest, or the just rights of third persons required the creation of a certain capital, but left the amount optional with the company; and when they have given no other authority to raise a capital in money (independent of the payments voluntarily made by the proprietors), than by sale of the shares of delinquent stockholders; it is not, perhaps, very unreasonable to give such a construction to their statute, as will confine the company to the exercise of the power expressly given. The power to assess is inferred from the power to sell; and the latter may, therefore, be considered as the only mode in which the former, for any practical purposes, can be exercised. It might be said, with some plausibility, that no general rule would be more just, or better adapted to carry into effect the intention of the legislature, than that which should declare that when an authority to impose a tax upon the shares of the members of the corporation is derived solely by implication from the power to sell the shares on failure to pay the tax, every other mode of collection is excluded, when there is no express promise to pay. In such a case, it might be said, the intention would be manifest to make the amount of capital paid in dependent upon the will of the stockholders, or upon the sale of the shares; that the proprietor does not incur a personal

obligation to pay any thing; but the company are clothed with authority to raise the necessary funds by a sale of the stock, upon the neglect of the stockholder to pay the just and equal assessments laid upon it. In this view, the assessment may be considered as made upon the stock merely, and the remedy in the nature of a proceeding *in rem*. Such would seem to be the import of the language used in some of the cases referred to.

In *Franklin Glass Co. v. White*, 14 Mass. 286, the court, in commenting on the cases cited by counsel from Esp. Dig. 7, to sustain the position that if a person becomes a member of any society or company, he thereby agrees to abide by all legal claims arising against him from the by-laws or local regulations of that society to which he belongs (2 So. Car. Const. 215), say, "in the cases cited from Espinasse, the penalties or assessments were set upon the *persons*, not upon the *shares*, as is the case under our statutes."

In *Ripley v. Sampson et al.*, 10 Pick. 371, Shaw, Ch. J., says, "the individual liability of stockholders created by the statute of 1808, was of a particular and limited character; and could only be enforced in the manner pointed out in the statute. It did not subject a living stockholder to a general liability for assessments, but only authorized the company to sell the shares for payment of the assessments. *By operation of law, the assessment is a lien upon the share.* The share is in the same condition with any other pledged property." And in *Cutler v. Middlesex Factory Co.*, 14 Pick. 483, the same judge uses similar language. "The only compulsory mode which a manufacturing corporation has to enforce the payment of assessments is by sale of the share. *By law, the assessment is a lien on the share.* The executor has an option to redeem the share for the benefit of the estate, by payment of the assessment, as he would have to redeem any other pledged property; and this option he will exercise according to his views of the interest of the estate."

A similar distinction is taken between assessments upon the person and upon the stock or property, in the case of *The Trustees of the Congregation in Hebron v. Quakenbush*, 10 Johns. 217. In that case the pew on which the assessment was made had been sold to the defendant free of rent, and the pews were sold at a high price in consequence of this exemption. The statute vests the possession of the church in the trustees, and gives them power to "regulate and order the renting of the pews therein." About six

months after the sale of the pews the congregation passed a vote that if any assessment was made on the pews, and it remained unpaid for one month, the pews should be sold for the benefit of the congregation. No promise of the defendant to pay rent was shown ; but he continued to be a member of the congregation, and occupied the pew he had purchased ; and the action was brought to recover his proportion of the salary of the minister, assessed by the plaintiffs on all the pews. The court, in giving judgment for the defendant, say, “ whether the assessment of the pew rent was a valid assessment, we need not now inquire ; for the defendant is not chargeable, in this case, upon the implied assumpsit to pay, in consequence of the occupation of the pew. The trustees have no power to make and levy personal assessments ; and the owner of the pew is not liable *in personam*, unless there be some special ground from which to infer a contract and promise to pay. The facts in this case are not sufficient to furnish such an inference.”

We are confirmed in the suggestions we have ventured to make touching the decision in Massachusetts, by adverting to the language of Sewall, Ch. J., in *Phillips Limerick Academy v. Davis*, 11 Mass. 113. Referring to the cases decided by the Supreme Court of that state, in which it was held, that no implied obligation on the part of the corporators to pay their assessments, arose from their being voluntarily members of the corporation, he says, “ it is said, that these decisions were upon the ground of another remedy provided by the legislature in the act of incorporation. *But that was not the sole ground, if it is in any respect a reason for those decisions.*” And upon no other principle than that the payment of the assessments was *intended* to be enforced only by a sale of the stock, inasmuch as the power to assess was implied merely from the power to sell, can we consider the remarks of the court in *Andover and Medford Turnpike Corporation v. Gould*, 6 Mass. 40, as having any just application. “ Persons not interested in having the turnpike, either from their situation or private property, may be requested to associate and become corporations. They may not be able to judge of the probable expenses or profits. But if they know that if the assessments become grievous, they may abandon the enterprise by suffering their shares to be sold, they may, on this principle, join the association.” This language, upon the supposition that no personal liability was *intended* to be im-

posed upon the proprietors, would be consistent with the good faith and moral honesty due to the creditors of the corporation.

If the plaintiffs' charter is compared with the provisions of the Massachusetts act, as stated in the reported case, a wide difference will readily be perceived between them, in the particulars which have been mentioned. In their charter the amount of the capital is not made to depend upon the caprice or the voluntary act of the corporation. "*It shall be* five hundred thousand dollars, with the privilege of increase to one million of dollars, to be divided into shares of one hundred dollars each." The company is vested with all powers, privileges, and immunities, which are or may be necessary to carry into effect the purposes and objects of the act, and is empowered to purchase, receive, and hold such real estate as may be necessary and convenient in accomplishing the object for which the incorporation is granted. A certain definite capital is created by the act, such as was deemed requisite to insure the completion of the work and the faithful performance of the contracts of the corporation. Ample provision was made that this capital should not be merely nominal, but real. For this purpose subscriptions were authorized to be received under such regulations as the persons named in the first section of the act might adopt. The directors were authorized to require payment for the stock, at such time or times, and in such proportions and upon such conditions, as they should deem fit. They were also authorized to sell the stock of delinquent stockholders; and a forfeiture of the charter was incurred, if one hundred thousand dollars was not expended upon the railroad within four years, or the road was not constructed, completed, and put in operation within six years from the passage of the act. In all these provisions great solicitude is manifested to secure the public interest, the rights of creditors, the usefulness of the corporation, the just expectation of the stockholders. A capital sufficiently large was required to be created. The payment of so much as was necessary to insure the completion of the work within a reasonable time, and to discharge all its debts, was enforced by the authority given to require payment of the instalments, to sell the shares of negligent proprietors, and by the forfeiture of the charter, if the commencement or completion of the undertaking was unreasonably delayed. It is true the payment of the assessments is dependent upon the action of the directors. They may limit the actual capital to a less sum than five hundred thousand

dollars, if the whole amount is not wanted for the object; but no just fears were entertained that their duties to the public, the corporation, and third persons would not be discharged.

In the plaintiffs' charter, the authority to demand payment for the stock, is not merely *implied* from the power given to sell; it is given in express and explicit terms; "the directors may require the payment of the sums subscribed to the capital stock," &c. The power to sell is additional to the power to demand payment, and is not the only power expressly given. Hence no inference can be deduced that the exercise of the authority to sell was the only means intended to be provided to secure the payment of the capital stock. The subscriptions to this stock were not like those to the turnpike stock in Massachusetts, — an engagement to take a certain number of shares of uncertain value, in a company without any fixed capital, — but an engagement constituting the subscribers stockholders in a company with a specified capital, the shares of a certain determinate value, and creating an obligation on them to comply with all the terms, conditions, and limitations mentioned in the charter, one of which gives authority to demand of them the payment of instalments, as they shall be ordered by the directors.

The form of the certificates of stock issued by the corporations in Massachusetts does not distinctly appear from the reported cases. In the case before us, a certificate was issued and delivered to the defendant, in which it is expressed, that the residue of the sums due for the stock is *payable* by instalments, as may be ordered by the board of directors.

After a careful examination of the decisions to which our attention has been called, we are inclined to the opinion that the decision first made (6 Mass. 40), and which was subsequently followed in the other cases cited, supposed to be similar, may be maintained upon principles which are wholly inapplicable to the case before us; and therefore that it ought not to be regarded as a precedent.

It will be observed that the remarks we have made, founded upon the distinctions between the general act of Massachusetts and the plaintiffs' charter, are confined to the act of 1804, and the decision under it, in the case of Andover and Medford Turnpike Corporation *v.* Gould, 6 Mass. 40. Several of the cases cited appear, from the reports, to have been decided with reference to other statutes, in which the distinctions noticed do not exist, —

certainly not all of them,—perhaps none of them. We have taken the leading case on which the defendant relies; have examined it in connection with the provisions of the act as they are referred to in it; and pointed out the distinctions between that act and the act incorporating the plaintiffs. If the subsequent cases do not admit of the same explanation, we may, without impropriety, say of them, that what was considered as a precedent had been established; that the maxim *stare decisis* was probably applied to them; and that the court may have adopted the opinion of Lord Eldon in *Townley v. Bedwell*, 14 Ves. 591, that although they did not mean to say that a great deal might not be urged against it, yet where there is a decision believed to be in point it is better to follow it.

We are not sure, however, that the highly respectable judicial tribunal, which decided these cases, was governed by any of the peculiar circumstances to which we have referred; nor will we confidently assert that the cases are not strongly analogous to, or are distinguishable from, the present case. If the court are to be understood as establishing and applying to all statutes in no sense *penal*, the position that where a new power is given by a statute, which also prescribes the mode of its execution, those who claim the power can exercise it in no other way, we feel constrained to say, we cannot give to decisions founded on such a position, the force of law in this state. We think the principle on which they are made to rest, when applied to the subject before us, is not “founded in sound reason;” nor is it sustained by any judicial precedent referred to in the decisions, or which we have been able to find. We believe these cases are the only ones in which the rule that where a statute creates an *offence* unknown to the common law, and in the enacting or prohibiting clause, points out the mode of proceeding under it, that mode alone can be pursued, has ever been held applicable, by analogy, to all *beneficial* statutes, unless it be the case of *Donaldson v. Beckett*, 4 Burr. 2408, in the house of lords, upon an appeal from a decree of the court of chancery founded upon the judgment in *Miller v. Taylor*, 4 Burr. 2303. And if the rule was applied to that case, it is the first and last *civil* case, in Great Britain, which has fallen under our notice, in which it has been held to be of universal application. It is, however, not certain that the decision in that case has ever been, or is now considered, as warranting the application of the rule to *beneficial*

statutes in general. *Beckford v. Hood*, 7 T. R. 620; *Wheaton et al. v. Peters et al.*, 8 Peters, pp. 679, 680, per Thompson, J.; *Nichols et al. v. Ruggles et al.*, 3 Day, 145. It is believed that it is confined principally to *criminal* cases; and is applicable to such cases because the offence and the remedy are so interwoven that the one cannot be separated from the other. *Castle's case*, Cro. Jac. 644; *Rex v. Robinson*, 2 Burr. 799; *Rex v. Boyall*, 2 Burr. 832; *The King v. Harris*, 4 T. R. 202; *Livingston et al. v. Van Ingen et al.*, 9 Johns. 507; *Almy v. Harris*, 5 Johns. 175. In the case of penal statutes, which are construed strictly against the person accused, and where a new offence and the mode of prosecuting it are created in the same clause, it has been supposed that the intention of the legislature to confine the mode of proceeding to that specified in the statute, was sufficiently expressed,—at least such has been the construction in favor of the offender against penal laws. But as to beneficial statutes, a liberal interpretation is to be given in advancement of the objects designed to be promoted. *Camp v. Bates*, and cases there cited, 13 Conn. 1. As to them, where a common-law remedy is not taken away by the statute which prescribes a new one, the latter is merely cumulative. In the case before us, the power to sell the stock of delinquent stockholders was given as an additional security to the public, the company and their creditors, that the instalments should be promptly paid. It was to operate as an incentive to the stockholder to make payment, and, at the same time, afford additional facilities to the company to obtain the necessary funds to effect the object of their incorporation. It was not intended to defeat that object altogether, whenever from the force of circumstances the stock might be unsalable, or much diminished in value. And no construction should be given to the plaintiffs' charter, unless the rules of law imperiously require it, which will defeat the object of the grant, impair the public interest, ruin the company, or defraud third persons of their just rights. *The King v. Everden*, 9 East, 101, per LeBlanc, J.; *Grays v. Turnpike Co.*, 4 Rand. 378. A construction which should limit the power of the company to a sale of the shares when instalments remain unpaid, would, we think, have a tendency to cause these results, and, in many cases, would actually produce them. We cannot adopt it, when neither the words nor the spirit of the act require it; and when no rule of law demands it.

We might add that it is by no means clear that the rule in crim-

inal cases to which reference has been made, would apply to the present case, were this a penal statute; for that rule is confined to cases where the particular remedy is created in the enacting or prohibiting clause, or where there is, *in terms*, no prohibitory clause.

It is an established principle that when a new offence is created by an act of parliament, and a penalty is annexed to it, by a subsequent separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. *The King v. Harris*, 4 T. R. 202. In the case before us, the authority to sell the stock is in a subsequent distinct substantive clause from those which incorporate the company, create its rights, declare its duties, and authorize subscriptions to the capital stock. The first section of the act creates certain persons therein named, and such others as shall associate with them, a body corporate and politic *in presenti*. Indeed, the power to sell is predicated upon the existence of the corporation and the formation of the company under the charter. All the acts necessary to give it vitality are supposed to have been done. It is considered as an existing body corporate, with powers to sue and to contract. It has received the engagement of the stockholders to take the stock; and their implied promise to pay for it, arises before the remedy by sale can be used; and this remedy being in a separate clause and not declared to be exclusive is, upon well established principles, only cumulative. We think, therefore, that the cases cited from Massachusetts, Maine, and New Hampshire cannot be vindicated upon the grounds on which it is supposed they were decided; that the rule applied to them is confined, principally, to penal statutes; or, if not, they are not within either the letter or spirit of that rule.

It may be added that if the act of becoming a stockholder under this charter, implies a promise to pay the assessments upon the stock (which we think it does, for the reasons heretofore stated), a familiar rule in the construction of statutes justifies us in saying that the promise is not abrogated by the additional power given to sell the stock of delinquent proprietors. "A statute made in the affirmative, without any negative, expressed or implied, does not take away the common law. 2 Inst. 200; Co. Litt. 115, *in notis*; Com. Dig. tit. Action upon Statute, C.; *Almy v. Harris*, 5 Johns. 175. The party may waive his benefit by such affirmative statute, and

take his remedy by the common law; which, however, does not mean that the statute is not binding, but that the party may make his election which to proceed upon." 1 Co. 64; Cro. Eliz. 104. And where a liberal construction is necessary to carry into effect the object of a remedial statute, although it be introductory of a new law, no negative ought in general to be implied.

The application of these principles to the case before us is not difficult. The act of becoming a stockholder pursuant to the provisions of this charter, is one from which the law raises a promise to pay the instalments legally assessed and demandable. The common law furnishes a remedy for a violation of this engagement by an action of assumpsit. The subsequent enactment authorizing the directors to sell the stock, is affirmative in its terms. It does not expressly, or by implication, take away the previous remedy which the common law has provided. No words are used indicative of an intention to deprive the corporation of their previously existing remedy; no necessity is perceived why they should be deprived of it; and every consideration arising from public policy, or connected with good faith and common honesty, demands that this remedy be continued in full force.

One further remark applicable to this branch of the subject, will complete all which we deem it necessary to say upon the whole case. It is conceded that had the defendant promised, in express terms, to pay the instalments, an action of assumpsit might have been maintained upon that promise. But if the 13th section provides the *only* remedy to enforce the payment, and, *therefore*, excludes an *implied* promise to pay, it is not readily perceived why it should not cause an *express* promise to be legally inoperative. There is no other consideration to support the latter than that which sustains the former. It is precisely the same in both. The moral obligation to pay is equally strong in both. The same facts, and no other, which it is believed raised an implied assumpsit in this case would exist, had an express engagement been superadded. But if the law would not raise a promise from these facts, simply because the act of incorporation has provided another remedy, why will it enforce an express promise founded entirely upon the same facts, with the same remedy continuing in full force? If, in consequence of the particular remedy provided, there is no legal presumption from the admitted facts that the stockholders *intended* to become personally responsible, how can the same facts sustain an

express promise where the same remedy may be applied? If the foundation of an *implied* promise fails, by reason of the existence of a special remedy provided by the statute, why is not the support of an express promise as completely taken away by force of the same remedy?

We consider, therefore, the 13th section of the plaintiffs' charter as affording a cumulative remedy merely; and that neither its language, its object, nor any analogies of the law which are known to us, require us to hold that remedy to be exclusive. *Chapman v. Pickersgill*, 2 Wils. 145; *Brown v. Chapman*, 3 Burr. 1418; *Ward v. Bird*, 2 Chitt. 582; *Rex v. Carlisle*, 3 B. & A. 161; *Sharp et al. v. Warren*, 6 Price, 131; *Delaware & Schuylkill Navigation v. Sansom*, 1 Binn. 70; *Union Turnpike Co. v. Jenkins*, 1 Caines, 380; s. c. 1 Caines's Ca. in Err. 86; *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Farmers Turnpike Road v. Coventry*, 10 Johns. 388; *Scidmore v. Smith*, 13 Johns. 322; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238; *Wetmore et al. v. Tracy*, 14 Wend. 250; *Harlaem Canal Co. v. Seixas*, 2 Hall, 504; *Idem v. Spear*, 2 Hall, 510; *Morris Canal and Banking Co. v. Nathan*, 2 Hall, 239.

It is proper to add that our decision in the present case has been made with reference to the facts stated in the motion for a new trial. Whenever other cases arise in which the facts do not correspond with those disclosed by this record, they will be duly considered.

The opinion expressed at the circuit was correct, and a new trial is to be denied.

In this opinion the other judges concurred.

DEFENCES AGAINST ACTIONS FOR CALLS.

Everhart v. The West Chester and Philadelphia Railway Co., 28
Pennsylvania St. Reports, 339.

Modifications and improvements in the charter of a corporation, useful to the public and beneficial to the company, and in accordance with what was the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription.

An alteration of a charter by the legislature may be so extensive and radical as to work an entire dissolution of the contract entered into by a subscriber to the stock, as an amendment which superadds to the original undertaking an entirely new enterprise.

A legislative act authorizing a railway company "for the purpose of completing and equipping their said railway" to issue preferred stock, the act to take effect when accepted by a majority in value of the stockholders, does not so alter the structure of the company, or change the objects of its institution, as to release a subscriber for stock from his contract.

Every subscription implies that the company may use the ordinary and lawful means for accomplishing the purposes of its charter.

An assignment of his stock by a subscriber without the assent of the company, and for the purpose of escaping liability upon it, is not a valid defence as to an action against him by the company upon his subscription.

OPINION.

WOODWARD, J. There are two principal questions in this case, the first whereof is whether the several acts of assembly supplemental to the acts which incorporated the company, wrought such essential and radical changes in the constitution and objects of the company as to release the defendant from the payment of the instalments on the stock for which he had subscribed.

The first of these supplemental acts, passed the 7th January, 1853, authorized the stockholders to elect three additional managers.

The next, passed 27th February, 1854, enacted that each share of stock should give the holder one vote at all elections of officers and other stock votes, provided he had held it more than thirty days prior to such vote.

The last act, passed 30th March, 1855, authorized the company, "for the purpose of completing and equipping their said railroad," to create a preferred stock to the extent of eight thousand shares of fifty dollars each, and for the purpose of redeeming its bonds and the preferred stock, and for the payment of other debts, to issue and dispose of bonds to any amount not exceeding six hundred thousand dollars, at a rate of interest not exceeding eight per cent per annum. Besides providing for many details connected with the preferred stock, the act stipulates that before it takes effect as a law of the corporation, it shall be accepted by a majority in value of the stockholders entitled to vote, and prescribes how the meeting of the stockholders shall be convened.

It was admitted on the trial that the company had accepted all the provisions of the above named acts of assembly.

Now it is too plain for controversy that this legislation was in aid of the objects and purposes of the corporation, which were in general to build and work a railroad from the borough of West Chester to the city of Philadelphia. The company were incorporated in pursuance of an act of assembly passed in 1848 — they had organized and commenced their work — and the preamble to the act of 1855 recites that they would require, to complete and equip their road, a greater sum than could be realized by the sale of bonds and stock now authorized by law, and that the making of a floating debt to meet such requirements would be onerous to the management of the road, and in all probability unduly hazard the interests of holders of its capital stock. Out of these embarrassments grew the remedial legislation that was accepted by the company, but which is now set up by one of the original corporators as a defence against his payment of stock.

The diligence of the learned counsel has failed to find a case to countenance such a defence.

Nothing is plainer than that an alteration of a charter by the legislature may be so extensive and radical as to work an entire dissolution of the contract entered into by a subscriber to the stock, as by procuring an amendment which superadds to the original undertaking an entirely new enterprise. Every individual owner of shares expects, and indeed stipulates with the other owners as a body corporate, to pay them his proportion of the expense which a majority may please to incur in the promotion of the particular objects of the corporation. By acquiring an interest in the corporation, therefore, he enters into an obligation with it in the nature of a special contract, the terms of which are limited by the specific provisions, rights, and liabilities detailed in the act of incorporation. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation on one part can assent by a vote of the majority, the individual on the other part by his own personal act. Consequently, where an assessment is sued for to advance objects essentially different, or the same objects in methods essentially different from those originally contemplated, they cannot be recovered because they are not made in conformity to the defendant's special contract with the corporation: *Angell & Ames on Cor.* § 537; *Union Lock & Canal Co. v. Towne*, 1 N. H. 44; *Mass.* 268; 10 *Mass.* 384; 7 *Barb.* 157; 1 *Harris*, 133; *Hester v. Memphis & Charleston Railroad Co.*, *Miss.*, see *Legal Intelligencer*, vol. xiv. No. 18.

Whilst these principles are unquestionable it is equally well settled by the authorities that modifications and improvements in the charter, useful to the public and beneficial to the company, and in accordance with what was the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription. *Irvin v. Turnpike Co.*, 2 Penn. 466; *Gray v. Monongahela Navigation Co.*, 2 W. & S. 156; *Clark v. Same*, 10 Watts, 364. The case of the *Indiana Turnpike v. Phillips*, 2 Penn. 184, is an instance of such radical alteration in the structure of the company as works a release of the subscriber. These general principles are founded in common sense, and it is apparent that they afford not the least support to this defence. The defendant voluntarily embarked in an enterprise which could only be carried out by accumulating large sums of money. His special contract with the other corporators looked to nothing less than a finished railroad from West Chester to Philadelphia; and it implied necessarily the ordinary and lawful means for accomplishing that object. When their money was expended and the work not finished, the necessary funds could be raised only by giving these funds a preference over the original stock, whether they came in the form of a loan or of preferred stock. Without the remedies provided by the legislature, the defendant's stock must remain worthless on his hands,—with them, he shared a common chance with others of realizing ultimate profits. The legislation, then, without altering the structure of the company, or changing the objects of its institution, or the mode in which those objects were to be pursued, set on foot a scheme of finance intended for its relief and benefit. It was to complete and equip the road,—the very road—the defendant had agreed to assist to build.

On the next question, which relates to the right of the defendant to transfer his stock so as to escape liability for the unpaid instalments, we are a divided bench; but a majority concur, though for different reasons, in holding him liable notwithstanding the transfer he made.

Two of us think he had a perfect legal right to assign his stock on any terms he pleased, but that unless it was done with the consent of the company he remained liable still to them as a stockholder for the unpaid portion of his subscription. One of our number is of opinion that if the assignment had been *bona fide*, it would have relieved him from further liability, but that the

record showing that it was a transfer *mala fide*, he remains liable. The only remaining judge who sat in the argument holds that the assignment was valid, and relieved the defendant from further liability. As neither of these opinions has the sanction of a majority, they are not to be discussed, and are indicated only to show that they result in an affirmance of the ruling below on this point.

The Philadelphia and West Chester Railway Co. v. Hickman, 28
Pennsylvania St. Reports, 318.

A condition annexed to a subscription for stock in a corporation that it shall be binding only in case a certain amount is subscribed and certain instalments paid in, is valid, and the subscriber is not liable until it has been complied with.

Where by the charter the president and managers had full power to ascertain not only the "time," but the "manner" of payment of all moneys due on stock subscribed before the organization, and of all moneys to become due on subscriptions subsequently taken, the corporation had a right to accept payment of stock in labor or materials, in damages which the company were liable to pay, or in any other liability of the company, provided, such transactions are entered into and carried out in good faith.

Independent of the express authority conferred by the charter, the corporation, as an incident of its erection, has the power to make all contracts, whether express or implied, whether by bond, bill of exchange, or negotiable note, which are entered into in the usual and necessary course of its legitimate business, except where there is a statutory prohibition.

As an incident to the power to conduct the business of the company, the corporation possesses authority to compromise disputes.

OPINION.

LEWIS, C. J. After the organization of the West Chester and Philadelphia Railroad Company, the managers, for the purpose of obtaining additional subscriptions to the capital stock of the company, adopted a proviso to be added to the form of contract to be subscribed by the future purchasers of stock. By that proviso it was stipulated that "the subscription hereto shall be binding only in the event of an aggregate of \$300,000 being subscribed, inclusive of all former subscriptions, and of such subscriptions as shall be made absolute or shall become so by the fulfilment of their conditions." To that contract, Eber Hickman, the defendant below, subscribed to the number of ten shares, promising to pay \$50 to each share, in such manner and proportions, and at such times as shall be determined by the president and managers of said company. This action is brought to recover the sums of money thus contracted to be paid.

By the act 11th April, 1848, entitled "An act authorizing the

governor to incorporate the West Chester and Philadelphia Railroad Company," commissioners were appointed to receive subscriptions to the stock according to the form prescribed in the act. That form contained no proviso of the kind contained in the contract of the defendant, and it was declared in the section authorizing the commissioners to receive subscriptions, that no subscription shall be valid unless the person so subscribing shall pay to the said commissioners at the time of making the same, the sum of \$5 on each and every share, for the use of the company. It is very clear that the proviso applies exclusively to subscriptions received by the commissioners before the organization of the company. It is contained in the section specifying their powers and regulating their duties. It provides that the money shall be paid to the commissioners. But when 1200 shares of the stock were taken, and \$5 on each share paid, the commissioners certified the fact to the governor, and letters patent issued according to the act of incorporation. A president and managers were elected, who were fully authorized by the charter to conduct the business of the company. They possessed the power to enter into any contract which was necessary to the purposes for which the corporation was created. They had power, not only to receive additional subscriptions to the extent of \$600,000 capital created by the act, but to increase the capital to the extent of \$1,200,000. The act of assembly placed no restriction upon the corporation, after it was organized, in regard to the payment of the sum of \$5 on each share of stock at the time of subscribing. On the contrary, the president and managers were authorized and empowered to ascertain the terms, manner, and proportions in which the said stockholders shall pay the money due on their respective shares. The words "the said stockholders," must be intended to include all the stockholders referred to in the previous section. That section includes in the corporation not only the subscribers existing at the time letters patent issued, but if the subscription was not then full, those also "who shall thereafter subscribe." So that, under the act of assembly, the president and managers had full power to ascertain, not only the "time," but the "manner," of payment of all moneys due on stock subscribed before the organization, and of all moneys to become due on subscriptions subsequently taken. But, independently of that express authority conferred by the charter, the corporation, as an incident of its creation, has the power to make all

contracts, whether express or implied, whether by bond, bill of exchange, or negotiable note, which are entered into in the usual and necessary course of its legitimate business, except where there is a statutory prohibition. This was expressly decided by this court, in the case of *McMasters v. Reed's Executors*. In accordance with this principle, it was said by Mr. Justice *Woodward*, in the *Erie and Waterford Plank Road Co. v. Brown*, 1 Casey, 156, that "after the company is organized, it often happens that new subscriptions can be obtained only on new and peculiar terms. One subscriber must have time given him; another must be permitted to pay in labor or materials; a third must have the road located through his property in a particular manner; and unless these conditions are complied with, the company cannot enlarge its stock, nor fulfil the object of its creation." There is nothing in the charter of the corporation before us which prohibits it from taking subscriptions on such conditions as are here enumerated. As the preferred stock is not in question here, the provisions in relation to it have nothing to do with the case. The commissioners act under a special authority, which must be strictly construed. The president and managers act under the general corporate powers granted, and these must be so construed as to enable them to carry out the object of the charter.

It follows from these views that the condition annexed to the defendant's subscription was valid; that the payment of \$5 per share at the time of subscription was legally dispensed with by consent of the contracting parties; that the terms of the defendant's contract contemplated any proper conditions which other subscribers might make as the terms of their subscriptions. It also follows that the corporation had a right to accept payment of stock in labor or materials, in damages which the company were liable to pay, or in any other liability of the company, provided these transactions were entered into and carried out in good faith. There is no presumption in this case that they are otherwise.

As an incident to the power to conduct the business of the company, the corporation possesses authority to compromise disputes; and if, in the collection of subscriptions, it is found necessary, in order to secure a part of a doubtful claim, or of one which cannot be collected by reason of the insolvency of the debtor, they may release a part for the purpose of securing the residue. This power must be understood as within the contemplation of all persons

when they become stockholders. All that is regarded is good faith in its exercise.

The defendant in this case cannot be made liable on his subscription, until the plaintiff shows a compliance with the conditions on which the subscription was made, and that the instalments were subsequently called in by the president and managers before suit brought. An error in making the call before the liability accrued may be corrected by a subsequent call, after the liability accrued and before action brought.

Piscataqua Ferry Company v. Jones, 39 *New Hampshire Reports*, 491.

Where a corporation adopts a by-law providing that if any subscriber for stock shall not pay the assessments upon such stock within thirty days after notice of the same, said stock shall be sold at auction, to pay the expenses of the sale and the assessments, and a person subscribes for shares in said corporation, and by the terms of his subscription promises to pay assessments thereon, he will be liable in assumpsit for assessments made upon his stock before resort is had to a sale of the shares under the by-law.

Any parol representations or agreements made at the time of subscribing for stock in a corporation, and inconsistent with the written terms of subscription, are inadmissible, inoperative, and void.

Where an article in the by-laws of a corporation provides that "ten per cent shall be payable on subscription, or the subscription shall be void," and a person subscribed for one share of the stock, without paying any thing at the time of subscription or afterwards until an assessment was voted upon his share, such subscription is not void, but at most only voidable at the election of the corporation; and whether voidable by the corporation until after demand made upon the subscriber and refusal on his part to pay ten per cent, *quære*?

THIS was an action of assumpsit to recover the assessments laid by the plaintiffs upon one share in the capital stock of their company. By the act of incorporation the plaintiffs were authorized "to establish and maintain a ferry, with horse, steam, or other power, across the Piscataqua River," &c.

At the time the defendant subscribed, and at the time of the subscription of Somerby, another subscriber, it was represented to them by the person — a member but not an officer of the corporation — who presented the subscription paper, that the purpose of the corporation was to build a horse ferry boat. Neither the defendant nor said Somerby ever paid any thing to the plaintiffs at the time of their subscription nor since. Others of the subscribers did not pay any thing at the time of the subscription, but paid before this suit. The other facts sufficiently appear in the opinion of the court.

OPINION.

SARGENT, J. This action is brought upon the following promise : "Piscataqua Ferry Company. The undersigned severally agree to and with the Piscataqua Ferry Company to take the number of shares in the capital stock of said company, fixed at two thousand dollars, set against their names respectively, and to pay to the treasurer thereof the assessments thereon, not exceeding fifty dollars on each share, at such times as the directors may order. Oct. 13, 1855," which was signed by the defendant for one share, and by other persons for thirty-nine shares. Article seven of the by-laws, adopted before the defendant became a subscriber, provides that if any subscriber shall not pay the assessments upon his stock within thirty days after notice of the same, said stock shall be sold at auction, &c.

The first question raised is, whether this action is properly brought, or whether the stock should have been first sold to pay the assessments, according to the provision of the by-law. In other words, whether the two are concurrent remedies, in a case like this, or whether the remedy provided by the by-law is the only one, to which the plaintiff is confined in the first instance. This by-law cannot, of course, have any greater or more controlling effect than a provision of the same kind would have if incorporated into and made a part of the charter ; and it has been settled, after full discussion and extended examination of the authorities, in *N. H. Central Railroad v. Johnson*, 30 N. H. 402, that where there was a provision in the charter similar to this by-law, and where there was also, as in this case, an express promise to pay assessments, assumpsit might be maintained. See authorities cited in this case, and also *Franklin Glass Co. v. Alexander*, 2 N. H. 380 ; *White Mountains Railroad v. Eastman*, 34 N. H. 137 ; *Ang. & Am. on Corp.* § 549, and cases cited.

Another question raised is, whether the representation made at the time the defendant and Somerby subscribed for stock, by the person who had the paper, was competent evidence to be considered, and if so, was it material ? Did it or could it affect the case ? We think it was not competent, and would not have been so, even if the person making it had been the agent of the company. It was only a verbal statement, and does not come within the rule stated in *White Mountains Railroad v. Eastman*, 34 N. H.

124, where it was held that a contract, *in writing*, given back to a subscriber for stock, at the same time of the subscription, by an agent of the company authorized to contract, providing that the terms of the subscription might be modified in a certain way, might be valid as part of the original contract of subscription, as between the parties, provided it did not operate as a fraud upon others. But this case is more like *George v. Harris*, 4 N. H. 533, where it was held that where a promise is direct, positive, unconditional, and in writing, parol evidence is inadmissible to contradict or vary such contract. And the further reason then stated also applies here, that the defendant's putting upon paper an unconditional promise to pay, may have induced others not only to subscribe but to pay, and his attempts now to shield himself by this private understanding may be a fraud upon others, who have thus been induced to subscribe and to pay. Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative, and void. *Conn. & Pass. Rivers Railroad v. Bailey*, 24 Vt. 465.

But this evidence, upon the case stated, would hardly be material if it were not incompetent. It nowhere appears but that the intention was, on the part of the majority, or even all the stockholders, at the time the defendant subscribed for stock, to build a horse ferry boat, and that the representations thus made to the defendant were not entirely true. There is no evidence tending to show that such was not the fact. The case merely finds that afterwards a steam ferry boat was built. The stockholders, after Oct. 13, 1855, and before May 15, 1856, may have changed, and possibly did change, their minds and purposes. Perhaps this change of purpose was made at the meeting of May 15, 1856, when, if the defendant had attended, he might have prevented such action. But any stockholder to any corporation subscribes, of course, knowing the liability of the majority to change their minds and of the liability to a change of purpose at any time, by a vote of a majority; and he cannot complain of any change of views or of purpose, provided the company keep themselves within the limits and restrictions of the charter, as they clearly did in this case.

The amount of stock is limited by the charter, so as not to exceed \$10,000, and the amount of the shares is also limited to \$50. No objection is suggested to the vote of the company limiting their stock to \$2,000, and this vote would seem to be unobjectionable.

The principal remaining question is, whether the subscription of the defendant was void, and could not be enforced on account of his not paying ten per cent upon it when he subscribed. If the defendant's and Somerby's subscriptions were valid and binding on them, then the company might well make the assessments and collect them. The provision of the by-law was as follows: "Ten per cent shall be payable upon subscription, or the subscription shall be void." The defendant's argument has proceeded upon the ground that this provision of the by-law is to have the same force and effect as though the provision had been contained in the act of incorporation of the company, and also as though the provision had been that the ten per cent should be *paid* at the time of subscription, instead of being that it should then be *payable*. With these changes in the facts, this case would present one of the questions raised in *Union Turnpike Co. v. Jenkins*, 1 Caines, 381, though there were various other questions raised in that case not presented in the case at bar. That case was decided in the Supreme Court of New York in favor of the plaintiff, that court holding that the subscription was not absolutely void in consequence of the non-payment of the ten per cent at the time of subscription, but only voidable, at the election of the company. This decision was afterwards reversed in the Court of Errors in that state. 1 Caines's Cases, 86. The law of the State of New York made the decision of the Court of Errors binding as an authority in that state, although the courts even there have been disposed to question somewhat the correctness of the decision. Indeed, it is difficult, and perhaps impossible, to ascertain the precise point upon which the Court of Errors reversed the former decision. The court may have held in that case, as they did in *Hibernia Turnpike Co. v. Henderson*, 8 Serg. & R. 219, that it was the intent of the law that no subscription should be received without a previous payment of five dollars a share, and considered that a contract could not be enforced in a court of justice which was made in violation of an act of legislature. If this were so, then it would make a material difference in the case before us that the provision is contained in a by-law of the corporation rather than in an act of the legislature in the charter. One question raised in *Turnpike v. Jenkins* was, as to the want of consideration for the subscription; and as the defendant seems to rely upon this decision in the Court of Errors, we will examine a little farther, and see how this decision has been con-

sidered by the courts of New York and some other states. In the *Goshen & Minisink Turnpike Road v. Hurtin*, 9 Johns. 217, the question was as to whether an action would lie at all upon a promise by a turnpike stockholder to pay his instalments, and whether the remedy given by statute to exact the penalty of the forfeiture of the shares, &c., was not the only remedy. It is there said that the decision of the Court of Errors in *Turnpike v. Jenkins* would seem to favor the latter doctrine, but the court conclude that it was not decided upon that point, and then add: "In that case the condition upon which Jenkins was to become a member of the company, by paying ten dollars, had not been performed, and the corporation was understood not to be *in esse* at the time of the making of the promise by Jenkins. It is to be presumed that the judgment of reversal went upon that ground, and that was the ground taken by the chancellor, who was the principal law-member of that court."

In *Highland Turnpike v. McKean*, 11 Johns. 98, the question was raised as to the validity of the subscription on account of the non-payment of the sum required by the charter to be paid at the time of subscription; and it was decided in a way to follow what the court supposed to be the decision in *Jenkins v. The Union Turnpike*, in the Court of Errors. But the court say, "It is a little difficult to ascertain the point upon which the Court of Errors grounded their decision. One of the questions before them was the one raised in the argument of the present motion." And the court, in the case of the *Goshen Turnpike Co. v. Hurtin*, seemed to suppose that to have been the point upon which the Court of Errors intended to decide.

From these remarks we infer that though the courts of New York felt themselves bound by the decision of the Court of Errors, yet that they did not consider the decision either as very intelligible or very satisfactory. And our impression is, from such examination of authorities as we have been able to make, that in other states the courts have been disposed to rely quite as much upon the original opinion of the Supreme Court, as upon that of the Court of Errors which reversed it.

In Kentucky, in *Wight v. Shelby Railroad Co.*, 16 B. Mon. 4, it is held that the failure of a subscriber for railway stock to pay the amount required by the charter to be paid at the time of subscription, does not exonerate him from his liability for his subscrip-

tion. It was his duty to pay it, and he will not be allowed to take advantage of his own wrong.

In *Vermont Central Railroad v. Claves*, 21 Vt. 30, the court allude to the decision of the case of *Union Turnpike Co. v. Jenkins*, by the Supreme Court of New York, as having decided that the non-payment of the ten dollars per share by Jenkins, when he subscribed for the stock, did not invalidate the subscription as to him, even though the company might have avoided the contract on that ground, had they chosen to do so. The court then say, "though the Court of Errors reversed that decision, it may well be questioned which is the better opinion."

In case of a lease of real estate for life or for years, when there is a condition that upon the neglect of the tenant to pay rent, or for any other default or misconduct on his part, the lease shall "cease and determine," or shall become null and void, or shall become utterly void and of no effect, or shall be and become void to all intents and purposes, in all these cases it has been held that the lease is not absolutely void as to the lessor but only voidable. It may be void as to the estate and interest of the lessee, who has done the wrong, or who has failed to do all that was required of him, at the election of the lessor, but as to the lessor it is only voidable. *Doe v. Bancks*, 4 B. & Ald. 401; *Arnsby v. Woodward*, 6 B. & Cr. 519; *Roberts v. Davey*, 4 B. & Ad. 664; *Clark v. Jones*, 1 Den. 516.

The lessor may dispense with the forfeiture and confirm the continuance of the lease. Courts in these cases merely apply the principle of the common law, that a party shall not be allowed to take advantage of his own wrong; and they will not ordinarily construe contracts in such a way as to allow either party to terminate them at pleasure, by his own improper act, or by any neglect to perform his duty. In *State v. Richmond*, 26 N. H. 232, it is said that any man may release or waive a right created for his benefit; and the rendering of the term *void* is fully discussed, and the distinction noted between those cases or contracts where it is to be understood to mean absolutely void and those in which it is to be understood as voidable only. And if it became necessary to decide this precise point in this case, it may be a question whether the court would not find it more consistent with the weight of modern authorities upon that subject; more in accordance with the principles applied in other analogous cases, and more especially in accordance with the

general tenor of our own decisions, to hold that the word void in this connection must be understood to mean voidable merely, at the option of the plaintiffs; void as against the party whose duty it was to make the payment at the time of the subscription, and who was thus the party in the wrong, if the company so elect; or the company might dispense with the condition which it would seem had been inserted for their benefit, and might affirm and ratify the continuance of the contract.

But there is a wide distinction between the contract or provision in the case before us and the one we have been considering, aside from the fact that in the one case the provision is inserted in the charter by the legislature, and in the other it is a provision adopted by the company in the shape of a by-law. In the case before us, the provision is that "ten per cent shall be *payable* upon subscription, or the subscription shall be void." The provision is not that the ten per cent shall be actually paid, but shall be payable. The company were not obliged to wait until assessments were ordered, but might call at the time of subscription or at any time afterwards and before any assessments were made, and before the company could legally make any; and this was probably the design in order to furnish the company with the means to defray the necessary expenses incurred in getting up the subscription and organizing the company. This amount of ten per cent was payable at the time of subscription, and so at any time afterwards when called for or demanded. It was a provision of which the company might avail itself at any time on demand; and if the defendant had been called upon at the time of the subscription, or afterwards, before the first assessment, and had failed to pay, then the question might arise whether the subscription was void absolutely, or voidable only at the election of the plaintiffs; but no demand having been made that question has not arisen to be decided. Had the defendant, at the time of subscription, supposed that it was to be a profitable investment, he could very easily have paid his ten per cent at the time he subscribed, and thus have secured his right to the stock; and if, before any demand, before the company had called for any part of it, he had paid or tendered the ten per cent, though not at the time of subscription, it may well be questioned whether he could not have so done, and thereby secured his right to the stock. If they had received his ten per cent when thus offered, he would, of course, have been entitled to his stock; and if, after demand, and

refusal of the defendant to pay, he had then changed his mind and offered them this amount, and they had received it, they would be held to have waived their right to avoid the contract for such non-payment upon demand.

It is putting no forced construction upon this contract to hold that the intention was, not that each subscriber, by the terms of his subscription, and of this by-law, was obliged actually to pay his ten per cent, but that this amount should, upon subscription, and as a condition precedent, and a part of the contract of subscription become due and payable at any time when the company should call. In such case the company would lose no rights by delaying to make a demand for what they were clearly entitled to, by the terms of the subscription and by-laws, at any time when they chose to demand it. It would seem that the plaintiffs did not need this ten per cent, and did not call for it, in several instances, until the assessments were made, and the defendant could not object that he was not called upon so soon as he might have been, to pay what the company had a right to demand at any time.

In *Northern Railway v. Miller*, 10 Barb. S. C. 260, the subscription was to be voidable upon the non-payment of the required per cent, and it was held that the payment was not essential to the subscriber's becoming a member of the company. So here, the requirement is not that the ten per cent should be actually paid, but only that it should thereupon become payable; that it is due and liable to be called for at any time, — payable on demand, whenever needed by the plaintiffs; that no subscription should be received upon any other terms, or in other words; and that any subscription that should be made, or attempted to be made, upon any other grounds or conditions, should be void. In this view, the subscription was filled up properly before any assessments were laid upon the members. No demand having been made by the company for the ten per cent, and there having been no intention or wish on the part of the company at any time to avoid the defendant's subscription, if they could have done so; but they, on the other hand, having voted at the earliest opportunity, that all persons who had signed the subscription, which was then presented for their consideration, signed by the defendant and others, should be admitted as members of said corporation, thus making it a matter altogether immaterial who obtained the subscribers' names, whether a director of the company or otherwise; the company

seemed to act in perfect good faith towards the defendant, and if the defendant had intended to avoid his subscription upon any grounds, if he could do so, it would seem to have been no more than common fairness that he should have given the company some notice to that effect, prior to the time when the company met and organized, and voted assessments upon its members. So that it would hardly seem that the defendant has any equitable ground, much less any legal one, upon which he can claim to be excused from the payment of these assessments.

According to the agreement of the parties, therefore, there must be judgment for the plaintiffs for the amount of the assessments, with interest from the time when they became due.

In *Vicksburg, Shreveport, and Texas Railway v. McKean*, 12 La. Ann. 638, where the act of incorporation required the company to commence the work in sections as nearly simultaneously as may be, and pointed out where the sections begin and in what direction the work should be carried on, and contained a proviso that the stock subscribers in each parish or corporation, or a majority in amount, should have the right to designate on what section of said road they desire their stock subscription to be used, it was held that evidence that the company had abandoned the idea of working on one section of the road, and determined to appropriate the funds of the company to work another section of the road, was incompetent for the defendant in an action against him on his subscription. “*Non constat*, but the directors were instructed where to commence the work by the stockholders under the proviso above recited. If that were not the case, and the first section of the act should be considered as imperative, instead of being simply directory, it would not benefit the defendant's case. It might possibly give rise to a proceeding on the part of the government to cause the charter of the company to be forfeited, but it could not relieve a stockholder from his subscription of stock.”

In *North Carolina Railway Co. v. Leach*, 4 Jones, Law, 340, it was held incumbent on a subscriber, who sought to avoid payment of his subscription on the ground that one of the *termini* was materially different from that provided in the charter, to show that this was without his concurrence and consent; and whether, even if he had objected, his defence would have been valid, inasmuch as he had power to prevent the change by an injunction or mandamus, *quere*. On these points, *Battle, J.*, says, “It is admitted that the eastern *terminus* of the plaintiffs' road was materially changed from the point designated in the charter, and the defendant contends that he was thereby released from the obligation to pay for the stock for which he had subscribed. The argument is, that the contract created by his subscription was, that he would pay for the stock taken by him, if, or upon condition, that the road should be built according to the *termini* and route prescribed in the charter; and, consequently, any material change, of either the *termini* or route, would be a failure on the part of the plaintiff in the performance of a condition precedent, whereby he, the defendant,

would be discharged from his part of the agreement. Or, in another view, it would be an attempt on the part of the plaintiffs to hold him bound by a contract into which he never entered.

“The question which the assumed defence raises is an important one, and we will now proceed to consider its validity.

“It may be conceded, at least for the sake of the argument, that if the legislature of a state grant a charter for building a railroad, turnpike, or canal between certain *termini*, and along a certain route, upon the faith of which subscribers take stock; and afterwards, without the consent, and against the will of one or more of the subscribers, the legislature passes another act, changing such *termini* or route, both or either of the dissenting stockholders may refuse to pay for the stock for which they had subscribed. Such was the decision of the Supreme Court of Georgia in the case of *Winter v. The Muscogee Railroad Co.*, 11 Ga. 438, founded upon previous similar adjudications made in Massachusetts and New York. See *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268; Same *v. Swan*, 10 Mass. 385; *The Hartford & New Haven Railroad Co. v. Croswell*, 5 Hill (N.Y.), 386. The principle of the decision is, that the stockholder, when called on to pay his subscription for the building of such a road, without his consent, may truly say, ‘non hæc in fœdera veni.’ Assuming, then, this to be true, an interesting question may arise, whether the principle will apply to a case where the alteration of the line of the road is made by the company without the consent, and against the will, of the stockholder; and also without the sanction of any legislative amendment of the charter. In the latter case there is certainly not the same necessity for protecting the dissenting stockholder, by holding him released from the obligation of paying his subscription. It is clearly settled that he may avail himself of the writs of prohibition or mandamus, as his case may require, either to prevent the corporation from doing him an injury, or to compel it to yield him a right. Thus in *Blakemore v. Glamorganshire Canal Navigation*, 6 Eng. Con. Ch. 544, Lord *Eldon* said, when the case was before him in one of its earliest stages, ‘I have, therefore, stated, and I have more than once acted on the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line which he would not have to its being made in another, and particularly he might feel that objection in a case where parties, after obtaining leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A. B. that the canal should come through the lands of C. D. than through those of E. F.; but to that, my answer is, that you have bargained with the legislature that you shall do the act they have authorized you to do, and no other act.’ We have adopted, and acted upon, at the present term, the principle thus laid down by one of England’s greatest chancellors, by enjoining the Greenville and Raleigh Plank Road Company from establishing and running a line of stages against the wishes of some of the corporators; upon the ground that such an application of their funds was not authorized by their charter. *Wiswall v. Greenville & Raleigh Plank Road Co.*, 3d Jones, Eq. (not yet reported); *Mayor and Aldermen of Norwich v. The Norfolk Railway Co.*, 30 Eng. Law &

Eq. 120, also sanctions the doctrine that railway companies may be restrained by injunction from misapplying the funds of the company (see the case at page 144). The above are all cases of injunction, where railway and other like companies have been prevented, at the instance of persons interested, from doing wrong. The case of *Regina v. The York & North Midland Railway Co.*, 16 Eng. Law & Eq. 299, shows, that in a proper case, a party interested may compel, by mandamus, a railway company to complete a railway which it has begun. It is true, that the case, though decided upon great consideration by the Court of Queen's Bench, with Lord Campbell at its head, was reversed in the Court of Exchequer Chamber, but solely upon the ground that the words of the act of Parliament, upon which the question depended, were not, and could not, be, construed to be compulsory upon the company. See the case in 18 Eng. Law & Eq. 199; see also *Regina v. Great Western Railway Co.*, id. 364. If the principle thus seemingly established by the greatest force of authority be correct, we cannot perceive why it did not furnish the defendant with ample means for preventing the wrong and injury of which he complains. Why should the courts interpose or protect him (to the great detriment of the company, in depriving it of its fund), by holding him discharged from his subscription, when he neglected to avail himself of a remedy, plain and ample? We need not, however, answer this question. There is another objection to the defence, about which we do not entertain a doubt.

“To make his defence available, it is certainly incumbent on the defendant to show that the alteration in the eastern terminus of the road was made without his concurrence and consent. Such seems to have been the opinion of the Court of Appeals of South Carolina, in the case of the *Greenville & Columbia Railroad Co. v. Coleman*, 5 Rich. 118, where they say, at page 135, ‘It would appear reasonable to say that, if the corporation did acts to which a member did not object, either because he was supine, or because he would not attend when he might and should have done so, it would not be harsh to hold him estopped from disputing his acquiescence, especially when liabilities, duties, and burdens might accrue thereby upon the corporation.’ There is not a particle of proof; indeed, he has not alleged in his plea, that he ever made the slightest objection to the change; and the presumption is, in the absence of proof to the contrary, that he assented to it. He was, or might have been, present, either in person or by proxy, at the occasional meeting of the stockholders (see *London City v. Venacker*, 1 Ld. Raym. 500), and yet we never hear of his having raised his voice a single time against the alteration which he now alleges to be so great a grievance to him. We hold, then, that the matter pleaded by the defendant in his second plea, and admitted upon the trial, furnishes no defence against the plaintiffs’ action.”

In *Black River & Utica Railway Co. v. Clarke*, 25 N.Y. 210, it is said that the intent of the section of the general railway act of New York, requiring the payment of ten per cent in cash on the amount of the subscription to be made in cash at the time of subscribing, doubtless was that no subscription should be valid until ten per cent was paid thereon, and not that it should be invalid if a short interval should occur between the actual subscription and the payment of the money. The subscription and the payment of the ten per cent must both

concur to make a valid subscription. The subscription one day, with payment the next, would satisfy the statute, and so would actual payment at any period after subscription with intent to effectuate and complete the subscription. The writing of the name in the subscription book should be deemed but part of the transaction, and provisional or conditional till the ten per cent is paid. But after payment, and certainly after payment of forty per cent on the subscription, as was the fact in this case, the statute requirement on this point must be deemed fully complied with by the defendant. And in *Beach v. Smith*, 30 N.Y. 116, it was held that an indebtedness from the company to the subscriber at the time of subscription for services in procuring subscriptions and right of way which was applied by the subscriber, in an account which he subsequently rendered to the company and which they allowed, in part in payment of ten per cent on his subscription, receiving the balance in cash, was a sufficient compliance with the statute.

EFFECT OF FUNDAMENTAL ALTERATION OF CHARTER.

The Hartford and New Haven Railway v. Croswell, 5 Hill's Reports, 383.

No radical change or alteration in the original charter of a corporation can be made or allowed, by which new and additional objects are to be accomplished, or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

Where a company was incorporated by act of the legislature to construct a railway from Hartford to New Haven, and subsequently the act was amended by authorizing the company to procure steamboats not exceeding \$200,000 in value, to use in connection with their railway, and to issue additional stock, and the act was accepted by the directors and a vote of the majority of the stockholders, it was *held*, that a subscriber was released from liability on his subscription.

THIS action was brought to recover certain instalments on the defendant's subscription to the capital stock of the plaintiffs. The facts sufficiently appear in the opinion of the court.

OPINION.

NELSON, C. J. The main objection taken to a recovery in this case is, that the plaintiffs are seeking to enforce the performance of a different contract from that into which the defendant entered when he subscribed for the stock; in other words, that the defendant never assented to the contract upon which the action is founded.

The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New Haven. The ten shares

subscribed for by the defendant were expressly taken upon "*the terms, conditions, and limitations*" mentioned in the charter. And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it; and the meaning and intent of the parties cannot therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more.

Since entering into this contract the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking, a new and very different enterprise,—and, for aught that can be known, a very hazardous one,—with the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed \$200,000; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed they can exercise no powers over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders. (*Livingston v. Lynch*, 4 Johns. Ch. 573; Coll. on Part. 641.) So here, the original charter is the fundamental law of the association—the constitution which prescribes limits to the directors, officers, and

agents of the company not only, but to the action of the corporate body itself—and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially and of binding the subscribers who have not given their assent. In the case of the Middlesex Turnpike Corporation *v.* Locke (8 Mass. 268), the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share and to pay all assessments made upon it. The ground of defence which prevailed was that the location of the turnpike road had been changed by an act of the legislature, after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had never assented to the alteration. The court said, "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, *non hæc in fœdera veni*. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of The Indiana & Ebensburgh Turnpike Co. *v.* Phillips (2 Penn. 184).

I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In *Irvin v. The Turnpike Co.* (2 Penn. 466), it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road made by an act of the legislature against his remonstrance; and this though the change was obviously to his prejudice in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and Kennedy, JJ., having dissented. In *Gray v. The Monongahela Navigation Co.* (2 Watts & Serg. 156); the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation, was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company and thus incidentally affect him.

I refer to the last two cases as affording a very full and able examination of the subject, without intending, at this time, to assent to their conclusions or to all the reasonings of the learned chief justice who delivered the opinions. In each of them, however, the general principle before asserted in *The Indiana and Ebensb. Turnpike Co. v. Phillips* is recognized, viz., that the alteration by the legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the principle as to admit of improvements in the charter, useful to the public and beneficial to the company, without this consequence.

In the case before us, the change in the powers and purposes of the plaintiffs' company has been so extensive as to preclude us from sanctioning a recovery upon the defendant's subscription, unless we are prepared entirely to abandon the principle above stated, and to declare that the interests of subscribers shall be subject to the will and pleasure of a majority of the stockholders.

Judgment for the defendant.

But the defeat of the special object of some one stockholder by an alteration of the charter varying the route, is not sufficient to excuse him from payment of his subscription; as where a stockholder subscribed for stock under the belief that the road would contribute largely to the growth of the place in which he

resided, and increase very greatly the value of real estate therein, and by an alteration of the line of the road a rival town would be built up to the injury of the town in which he lived, the court say, conceding that such will be the consequence, it does not follow that the subscribers are thereby exonerated from the payment of their stock. In every such enterprise the interest of the few must yield to the greater interest of the many. Each stockholder may desire to advance some particular object, or to promote in some way his own individual interest; but it is the duty of the directors to adopt such measures as will be most advantageous to the stockholders in the aggregate, and as are best calculated to further the purposes for which the company was incorporated; and the court enunciate the general rule that such alterations of the charter as are necessary to carry into effect its main design, may be made without his consent. A subscription, upon the express condition that the line of the road should come in a particular place, must be performed in order to bind the subscriber. But the condition must be made a part of the written subscription. p. 207 and n. An alteration which materially and fundamentally changes the responsibilities and duties of the company, or which superadds an entirely new enterprise to that which was originally contemplated, may be resisted by the stockholders, unless such alterations are provided for in the charter itself, or in the general laws of the state in force at the time the act of incorporation was passed. *Fry's Ex'ors v. Lexington & Big Sandy Railw.*, 2 Met. (Ky.) 314. See also, to the same effect, *Baltimore & Ohio Railw. v. Wheeling*, 13 Gratt. 40; and upon the right of relief by injunction, *Beman v. Rufford*, 6 Eng. Law & Eq. 106, and *Winch v. The Birkenhead, &c. Railw.*, 13 id. 506, cited *Baltimore & Ohio Railw. v. Wheeling*, *supra*. See also *Gifford v. New Jersey Railroad & Transportation Co.*, 2 Stockton Ch. 171.

SUBSCRIPTIONS BEFORE DATE OF CHARTER, WHEN VALID. — WHEN
TO BE PAID IN MONEY.

Vermont Central Railway Company v. Clayes, 21 *Vermont Reports*, 30.

By section four of the statute incorporating the Vermont Central Railroad Company, certain persons named were constituted commissioners for receiving subscriptions to the capital stock of the company; and it was enacted as follows: "And every person, at the time of subscribing, shall pay to the commissioners five dollars on each share for which he may subscribe, and each subscriber shall be a member of said company;" and it was further enacted, that when one thousand shares should be subscribed, the commissioners might issue a notice for the stockholders to meet and elect directors. The defendant, after some other shares, but less than one thousand, had been subscribed for, subscribed for fifty shares, and, instead of paying to the commissioners, in money, five dollars upon each share at the time of subscribing, he gave them his promissory note for that amount, being two hundred and fifty dollars, which was made payable to "The Commissioners of the Vermont Central Railroad Company" on demand, for value received. This note was received from the commissioners by the corporation, upon its organization. And it was *held*, that the note was given upon sufficient consideration, and that it was a valid note in the hands of the corporation.

And it was also *held*, that an action might be sustained upon the note in the name of the corporation.

And it was also *held*, that the provision in the charter, that each subscriber should be a member of the company, and the fact that others had subscribed for stock previous to the defendant's subscription, were sufficient to show, that the corporation was *in esse* at the time of making the note, and so capable of taking the promise, through their agents, the commissioners, notwithstanding their right to organize was made to depend upon certain conditions, which were not fully complied with until after the note was executed.

THIS was assumpsit upon a promissory note. The facts sufficiently appear from the head-notes and opinion of the court.

OPINION.

BENNETT, J. It is claimed by the defendant, that the note now in controversy is *without consideration*. The defendant and others had signed an instrument, by which the subscribers agreed to take, and did take, the number of shares of the capital stock of the company, affixed to their respective names; and this defendant subscribed for fifty shares of the stock. The note in suit was given for the first five dollars payable on each respective share, which, by the terms of the charter of incorporation, was to be paid to the commissioners at the time of the subscription. This, it is said, cannot constitute a sufficient consideration to sustain the note; but we think otherwise.

By the terms of the charter each subscriber becomes a stockholder and a member of the company; and the interest thereby acquired is a sufficient consideration to support an action for the amount subscribed, against the person subscribing, upon an express promise to pay the subscription. See Wordsworth on Joint Stock Companies, 317: 39 Law Lib. 85; Worcester Turnp. Co. *v.* Wilson, 5 Mass. 80; Goshen Turnp. Co. *v.* Hurin, 9 Johns. 217; Dutchess Cotton Manuf. Co. *v.* Davis, 14 Johns. 238; Baltimore Turnp. Co. *v.* Barnes, 6 Har. & Johns. 57. The defendant, having given his note for the first instalment to be paid upon his shares, cannot stand in any more favorable light, than if the action had been upon a subscription containing an express promise to pay the amount subscribed, as the same should be assessed. Though the corporation was not in point of fact organized at the time when this defendant subscribed for his stock, yet his concurrence in obtaining and accepting the charter of incorporation, and thereby becoming himself a member of the corporation, raises a *mutuality* in his contract, and gives efficiency to his subscription.

We do not think, that the simple fact that the commissioners accepted the note of the defendant in lieu of so much money, or, as the case finds, in *settlement* of the sum which was to have been paid upon the making of the subscription, can have the effect to give the defendant the right to repudiate his contract, or render it void for want of consideration. The corporation, having accepted this note as so much cash, could not certainly deny to the defendant the rights and privileges of a corporator.

The act does not, as in the case of bank charters, require the first instalment to be paid in specie; and no good reason is perceived why it should. If it is paid in money's worth, every valuable purpose of a payment is answered; and we see no objection to the commissioners regarding the defendant's note as money's worth, if they saw fit. There is no pretence, that the public have an interest in this subject, as in the case of moneyed corporations, which needs protection, and which might lead the court to require a strict performance of the provisions of the charter. There is no pretence that this note was taken in bad faith, or to the injury of any of the corporators. It is quite another question whether the corporation might have declined to have received this note of the commissioners, and required of them to have advanced the money, if they had thought proper. But we are not called on to pass upon any such question. Neither are we required to determine what would have been the rights of the defendant, as a corporator, if the corporation had declined to receive the note from the commissioners; but, having received it, the defendant must be entitled to all the rights he would have had if he had paid the money upon subscribing; and, upon the principle of *mutuality*, the note must be held valid in the hands of the corporation.

In the case of *The Union Turnp. Co. v. Jenkins*, 1 Caines, 381, the act of incorporation required the payment of ten dollars on a share at the time of subscription. The defendant subscribed for two hundred and eighty shares, but paid nothing; neither was any thing demanded by the commissioners. It was in that case urged, that, as the first instalment of ten dollars was not paid, the contract was incomplete, and not obligatory upon the company, and consequently not binding upon the defendant. But the Supreme Court held that this did not affect the validity of the subscription. Though the Court of Errors reversed that decision (see 1 Caines's Cases in Error, 86), it may well be questioned which is the better

opinion. But in the case now before us, not only was *the five dollars* on a share demanded by the commissioners at the time of subscription, but it was in fact paid to them in the defendant's note, which the case finds was received in *settlement* of the first instalment payable on the shares subscribed for. If the present note is not valid, the whole subscription is void, and neither party acquired any rights by means of it. This, we think, can hardly be contended for.

The more important question would seem to be, can the present plaintiffs maintain an action on this note? It is said, the corporation was not *in esse* at the time of making the promise. If this be so, it would be difficult to get over the objection. But the first section of the plaintiffs' act of incorporation declares, in express terms, that such persons as shall thereafter become stockholders of said company *are* constituted a body corporate, &c. Though it is necessary that every corporation should have corporators, yet we find, by the fourth section of the act, that every subscriber for stock becomes *per se* a corporator; and by the subscription paper, which is made a part of the case, it appears, that there were several subscribers for stock prior to the defendant's becoming one. Each subscriber for stock *per se* becomes a member of the corporation, and *all*, as fast as they subscribe, become *corporators*, under the provisions of the act. To justify an organization of the corporation, certain things are made necessary; but in the eye of the law this corporation should be regarded *in esse* before they have the right to organize. It is the statute, which creates the subscribers for stock a corporation, and not their organizing under it. It is usual, in acts of incorporation, to designate the names of certain individuals as corporators; but that was not done in this instance. As the act incorporates all, that shall thereafter become stockholders, it may be taken, for the purpose of giving *vitality* to the charter of incorporation, that the defendant, as well as other subscribers for stock, became such on the day the act of incorporation passed, although in point of fact they did not subscribe until some time subsequent. See *Chester Glass Co. v. Dewey*, 16 Mass. 94. If this be not so, the charter must, at all events, have *vitality* from the time individuals became stockholders in point of fact, by an actual subscription; and this is sufficient for present purposes.

The note contains a promise, "to pay the Commissioners of the Vermont Central Railroad Company," two hundred and fifty

dollars. It is claimed that this is a promise to pay the individuals who were appointed the commissioners for receiving subscriptions for the company, and not a promise to the corporation, and that such individuals alone have the right of action. Although it may be true, that, as to bills of exchange, the person named as payee has the right of action, and not the person who has the beneficial interest, and that it is to be determined upon the inspection of the bill alone, who has the right of action, or, in other words, who is the promisee, and although we should concede, that the same principle should apply to promissory notes, yet the important inquiry is, who is the payee, upon the face of this note? Is it the railroad company, or the individuals who constituted the board of commissioners? The commissioners are not named in the note as individuals, but only referred to officially, as the commissioners of the "Vermont Central Railroad Company." If the promise had been to A., B., and C., Commissioners of the Vermont Central Railroad Company, the question would have been quite a different one from what is raised in this case.

I think the authorities well sustain the position, that where the principal is named in a bill of exchange, or promissory note, and the agent is not, except officially,—as a promise to pay "the cashier of the Bank of Burlington,"—the principal, who is named is to be taken to be the promisee, rather than the agent, who is not named; and this, too, upon the face of the instrument. In the case of the *New York African Society v. Varick et al.*, 13 Johns. 38, the bond was executed to the *standing committee* of that society; and it was claimed, that the society could not sustain an action on it; but it was held otherwise. So in *Bailey v. The Onondaga County M. Ins. Co.* in error, 6 Hill, 476, the bond was given to the directors of the company, to be paid to the *said directors, their successors and assigns*; and yet it was held, in legal effect, to be a bond to the company. In the case of *The Commercial Bank v. French*, 21 Pick. 486, the promise in the note was to pay "the cashier of the Commercial Bank, Boston, or his order;" and the action was sustained on the note by the bank. See, also, the case of *Bank of United States v. Lyman et al.*, 20 Vt. 669, where this subject is ably and fully considered. Also, 1 Am. Lead. Cas. p. 461.

Our own courts have gone much farther than is necessary to go to sustain the present action, and that, too, in the case of promis-

sory notes. In *Arlington v. Hinds*, 1 D. Ch. 431, the promise was "to pay Luther Stone, town treasurer, or his successors in office;" and yet it was held that the town of Arlington might maintain the action. In the case of *Bank of Manchester v. Slason*, 13 Vt. 334, the bill was indorsed thus, "pay to M. Clark, Esq., cashier;" and yet, it appearing in evidence, that Clark was at the time cashier to the Bank of Manchester, and that this was the uniform mode of indorsing paper to banks, it was held, that the action was well brought in the name of the bank. It may be remarked, that in both of these cases the agents are designated by name, as well as officially, and there is no designation of their principals, in either case, upon the face of the paper. In the case before us the commissioners are a part of the necessary machinery for getting this corporation into operation, and are *quasi* agents of the corporation, necessarily acting in their behalf, prior to an organization. We think, that, upon this note, the company are the proper persons to bring this action, and especially as it appears, that the consideration, for which the note was given, was stock subscribed for by the defendant. In effect, it is a promise to the corporation, through the commissioners.

No question was raised in the county court as to the existence of the plaintiffs as a corporation, and none has been raised in argument in this court, excepting whether they were *in esse* at the time the note was executed; and probably none could be raised under the present pleadings.

The result is, the judgment of the county court is affirmed.

As to whether a subscription may be made payable in any thing but money, the Supreme Court of Pennsylvania say in *Pittsburg & Connellsville Railway v. Stewart*, 41 Penn. St. 58, "It is no longer to be doubted that an incorporated company, after it has obtained its letters patent and effected its organization, may receive conditional subscriptions to its stock. It may stipulate with subscribers that they may pay in any manner mutually agreed upon, and it can enforce a subscription only according to its conditions. Not so with subscriptions made before a company is organized. They must be unconditional. There is no authority existing anywhere to receive them upon terms, or to vary the mode of payment. This difference is a well recognized one in our law, as well as in the law of other states." But subscriptions must be made payable in the full amount subscribed; and even if the corporation had power by any stipulation to preclude themselves from a remedy to enforce the payment of the full amount subscribed for stock, it does not follow that the creditors of the company can be precluded by any such condition. A railway corporation is not created

for its own sake, nor to serve its private ends alone, but for public purposes; and it would pervert some of the great ends of its being, and the objects of its charter, if it had legal power to dispose of its stock upon any terms which should defeat the public interests and defraud its own creditors. *Church C. J., Mann v. Cooke*, 20 Conn. 188.

RAILWAYS OBTAINING LAND BY PURCHASE AND CONSENT OF OWNERS.

Babcock v. Western Railway, 9 Metcalf's Reports, 553.

A. granted to the Western Railroad Corporation full and free license and authority to locate, construct, repair and for ever maintain and use a railroad, upon, through, and over his land, and to take his land therefor, to the extent authorized by their charter. The land was so situated that the embankment of the railroad would cause water to accumulate on the upper side thereof, and it became necessary to provide for the passage of water to the lower side. The corporation, therefore, made culverts in suitable places and in a convenient manner; but the situation of the land was such that it was necessary to connect ditches with the culverts, and extend the ditches, beyond the line of the location of the railroad, into the land of A., in order to prevent the water from setting back so as materially to injure the railroad or damage the land of A. *Held*, that the corporation were authorized by said license so to make said culverts and ditches, under the rule of law, that a grant of a thing includes the means necessary to attain it. *Held*, also, that the corporation were authorized, by said license, to deepen and widen, in the land of A., beyond the line of the location of the railroad, the bed of a mountain stream, over which the railroad was laid out and constructed, to facilitate the discharge of the waters of the stream; such deepening and widening being necessary to secure the railroad from damage, or to prevent the land of A. from being broken and washed away. *It seems*, also, that the corporation had authority to do the aforesaid acts under their charter and the Rev. Sts. c. 39.

TRESPASS for breaking and entering the plaintiff's closes in Chester, lying on each side of the defendants' railroad, and there cutting ditches, &c., and piling earth and stones on the plaintiff's soil adjacent to the track of said road. Trial before the chief justice, who made the following report thereof:—

After the plaintiff's evidence was introduced, the defendants gave evidence tending to show that the land was so situated that the embankment for the railroad would cause the water to increase on one side, and that culverts were laid under the road, in three places, to carry it off. The jury were instructed, that if the land was so situated that some expedient was necessary to provide for the passage of the water from the upper to the lower side, and these cul-

verts were laid in suitable places, and in a convenient manner, the defendants had authority so to make them ; and further, that if it was necessary to connect drains or ditches with these culverts, and if, by terminating them at the limits of the location of the railroad, the water would naturally dam up, or set back, so as materially to injure the railroad, or damage the land of the adjacent owner ; and if it was necessary to extend such ditches beyond those limits, to avoid these consequences, the defendants were authorized so to extend them into the land of the adjacent proprietor.

There was evidence tending to show that the railroad crossed a mountain torrent, near its outlet into a river ; that the water frequently rushed down this stream with great violence, and in great quantity ; that the defendants had removed rocks, and deepened and widened the bed of the torrent, below the track of the railroad, to facilitate the discharge of the stream into the river. There was some conflict of evidence, on the question whether the bed of the torrent, thus deepened and widened, extended beyond the limits of the location of the railroad, into the plaintiff's land ; but the evidence tended to show that it did. Whereupon the jury were instructed, that if it was necessary to widen and deepen the bed of this mountain stream, in order to facilitate the discharge of its waters into the river, and if this was necessary, to secure the railroad from damage or to prevent the land of the adjacent proprietor from being broken and washed away, then the defendants had authority so to deepen and widen the bed of the stream, beyond the limits of the location of the railroad. The jury were instructed that the defendants had this authority, either under their act of incorporation (St. 1833, c. 116), or under an agreement entered into between them and the plaintiff, which was given in evidence by the defendants, dated October 20, 1836, and by which the plaintiff, for the consideration therein mentioned, under his hand and seal, did "grant, assign, transfer, and convey to said railroad corporation, and for the use thereof, and their successors and assigns, full and free license and authority to locate, construct, repair, and for ever maintain and use the said railroad, upon, through, and over my said lands, in such places and courses as the said corporation may judge necessary and convenient, and to take therefor my lands, to the extent authorized by their charter," &c. (See 6 Met. 347.)

The jury were further instructed, that the defendants had no

right to enter upon the plaintiff's lands adjacent to the railroad, for the purpose of obtaining materials, or piling up and depositing waste earth or stones, without a license from the plaintiff.

To the foregoing instructions, except the last, the plaintiff excepted; and a verdict being returned for the defendants, the plaintiff moved that it should be set aside, and a new trial be granted. This motion was reserved for the consideration of the whole court.

SHAW, C. J. Upon a review of the directions given to the jury, the court are of opinion that they were correct. They are founded on the obvious distinction between that which is necessarily incident to the prosecution of the work, and that which would only be convenient. Com. Dig. Grant, E. 11. Water can be drained off only in a particular direction, and by one method; that is, by making a drain from the place where it accumulates to a lower level. It is a general rule, we think, that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. The court are therefore strongly inclined to the opinion, that under the act of incorporation, passed March 15, 1833 (St. 1833, c. 116), and the general laws respecting the establishing of railroads, the corporation had the authority in question, independently of the plaintiff's deed. Rev. Sts. c. 39, §§ 45, 54, 56. Upon this principle, it has been decided that all persons, — not merely those whose land is taken for laying the road, and for supplying materials, under §§ 54, 55, but, by § 56, all persons who may sustain damage occasioned by laying out, making, or maintaining their road, — shall have a remedy against the corporation. *Dodge v. County Commissioners*, 3 Met. 380. *Ashby v. Eastern Railroad*, 5 Met. 371. The only ground on which such damages could be allowed is, that they are authorized, because they are the natural and necessary consequence of the acts authorized to be done. But this must be confined to that which is strictly necessary to accomplish the enterprise. When it is necessary to *take lands* of a greater width than five rods, for embankments, deep cuts, or the supply of materials, a license from the county commissioners is necessary. But such a taking ordinarily unfits the land for the uses of the owner, and is in its nature an appropriation; but we cannot consider that laying a drain through or under land, to draw off water, is such taking or appropriation, or requires such license.

But whatever might have been the rights of the corporation, by their act of incorporation and the laws limiting and defining the powers and duties of railroad companies, the court are of opinion, that the power exercised by the defendants was granted by the plaintiff's own deed. It is a well known and reasonable rule, in construing a grant, that when any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also. *Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* By the grant of a ground is granted a way to it. Shep. Touch. 89. The plaintiff, by his deed executed before the acts done, and before the location of the road, granted to the corporation, their successors and assigns, full and free license and authority to locate, construct, repair, and for ever maintain and use the said railroad, upon, through, and over his said lands, &c. If the laying of the drains or ditches in question, through the plaintiff's land, or the deepening of the bed of the mountain torrent, in his land, *extra viam*, beyond the limits of the five rods, was necessary to the construction, or to the maintenance of the railroad, the authority so to do was granted by this deed, and the direction to the jury, to that effect, was right.

Judgment on the verdict for the defendants.

In the *Central Railway Co. of New Jersey v. Hetfield*, 5 Dutch. 206, 571, it is held that where the charter of a railway company gives power to take lands for the purposes of their road, and to take possession of and hold the lands with the consent of the owner, or without consent when payment or tender of damages is made, it means a legal consent, and such a clause does not affect the statute of frauds. And if the company take possession of the land, and use it without the consent of the owner or payment of damages, they are liable to an action of trespass; but if a trespass is committed, it is against the owner of the land at the time it is taken. In *Branson v. The City of Philadelphia*, 47 Penn. St. 329, it is held that every licensee from a public authority, whether a municipality, exercising a portion of the high powers of eminent domain, or the immediate agents of the commonwealth itself, necessarily takes the license subject to the right of eminent domain, to be exercised for the benefit of the public in the future as well as in the past.

SPECIFIC PERFORMANCE IN EQUITY.

Western Railway v. Babcock, 6 Metcalf's Reports, 346.

It is a good defence to a bill in equity, praying for a specific performance of an agreement to convey land, that the defendant was led into a mistake, without any gross laches of his own, by an uncertainty or obscurity in the descriptive part of the agreement, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal, or oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. But in such case, the burden of proof is on the defendant to show such mistake on his part, or some misrepresentation on the part of the plaintiff.

Where a party agrees, for a certain consideration, to permit a railroad corporation to construct a road over his land, on any one of two or more routes, at their option, and to convey the land to the corporation, for certain sums, according to the route that shall be taken after the road shall be definitively located, he cannot defend against a bill for specific performance of his agreement, by showing that he was induced to believe, either by his own notions or by the representations of third persons as to the preference of one route over another, that the corporation would select a route different from that which they finally adopted; nor by showing that the corporation or its agents made representations as to the probability that one route would be adopted in preference to another, or as to the relative advantages of each route.

Where a party agrees under seal to permit a railroad corporation to construct a road over his land, and also agrees to convey his land to the corporation for a certain sum, after the road shall be definitively located, with a condition in the deed of conveyance that the deed shall be void when the road shall cease or be discontinued; specific performance of such agreement may be decreed, after the road is constructed over the land, although the corporation did not expressly bind itself to take or to pay for the land. And where, in such case, the corporation takes the land, constructs a road over it, and is, for three or four years, in actual possession and use of all the privileges which the performance of the party's agreement would give, and then files a bill against him for specific performance of his agreement, the bill will not be dismissed on the ground of unreasonable delay in filing it.

Where an agreement by deed is made with a corporation, and is delivered to an agent of the corporation, who was duly authorized to negotiate it, it is delivered to the corporation, and his acceptance thereof is the acceptance of the corporation.

In order to prevent a decree for specific performance of a contract, on the ground of inadequacy of consideration, the inadequacy must be so gross, and the proof of it so clear, as to lead to a reasonable conclusion of fraud or mistake.

Where a party who has agreed to convey land, for a certain sum, to a railroad corporation, for the site of a road, refuses to perform his agreement, and obtains an assessment, according to law, of his damages caused by the laying out of the road over his land, the measure of the damages to which he is liable for breach of his agreement, is the excess of the sum assessed at law over the sum for which he agreed to convey the land.

OPINION.

SHAW, C. J. This is a case in equity, in which the Western Railroad Corporation seek the specific performance of a contract

made by them with the defendant, previously to the definitive location of their road, by which he stipulated to convey to them in fee, on certain conditions, as much of his land as would be necessary to their railroad, at rates therein specified. The bill sets forth the agreement by which he stipulated to receive compensation at certain specified rates per acre, for the different kinds of land which the railroad might traverse, and a provisional allowance for fencing. Proof was offered of the execution of the contract, as also of the final location of the road, passing, to a considerable extent, over the defendant's land, as also of the tender of the money, and demand of a deed conforming to the agreement.

The ground of defence is, that the defendant was deceived or mistaken, and led to execute an agreement different from that which he supposed he was executing ; that he did not understand where the line was, as described in the agreement, but supposed the line contemplated to be adopted to be a different line from the one over which the railroad was in fact located, and one the adoption of which would have done him less damage.

This is mainly a question of fact upon the evidence, and has been so argued by the counsel, and considered by the court.

The court, in the main, accede to the principles of law stated by the defendant's counsel, as those upon which the defence is placed. In an application to a court of equity for a specific performance, a decree for such performance is not a matter of strict right, on proof of the agreement, but may be rebutted by showing that to require such an execution would be inequitable. A defendant, therefore, may not only show that the agreement is void, by proof of fraud or duress, which would avoid it at law ; but he may also show that, without any gross laches of his own, he was led into a mistake, by any uncertainty or obscurity in the descriptive part of the agreement, by which he in fact mistook one line or one monument for another, though not misled by any representation of the other party, so that the agreement applied to a different subject from that which he understood at the time ; or that the bargain was hard, unequal, and oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. In either of these cases, equity will refuse to interfere, and will leave the claimant to his remedy at law.

But, to establish either of these grounds of defence, the burden of proof is plainly on the defendant ; and to bring his case within

the former, he must show such mistake on his part, or some misrepresentation on that of the complainant or his agent, seeking to enforce the performance of the contract. In doing this, it is not competent for the defendant merely to aver that he was under a mistake as to the description of the route, or other subject-matter of agreement, or, when the description was precise and clear, that he signed the agreement without reading or hearing it, where he had the means offered him of doing so. He must show an honest mistake not imputable to his own gross negligence.

One other consideration, which we think applicable to such a case, is this : that where a man has stipulated, for a certain consideration, to permit a company to construct a road over his land, by any one of two or more routes, at their option, it is not competent for him afterwards to resist the performance of his agreement, by showing that he was induced to believe, either by his own notions, or by the representation of others, as to the preference of one over the other, that a particular one was adopted which he did not expect ; nor would this result be affected, if the other party, or their agents, had made such representation, as to the probability of their adopting one route in preference to the other, or of the relative advantages of each. Having, by the terms of the contract, stipulated for the right to adopt either, and stipulated to pay a consideration for such right of choice, all representations respecting the probability of their adopting one rather than the other, must be considered as merged in the agreement ; and if, in fact, the one route would cause more damage, and the land-owner intends to claim larger compensation in one case than in the other, the alternative must be stipulated for in the agreement itself.

One objection was taken to this agreement, not, we presume, to its legality, but to the fitness and propriety of enforcing its performance in equity ; which is, that it was not mutual, because, although the defendant bound himself to convey his land at certain prices, the company did not bind themselves to pay him those prices.

In the first place, the contract, being under seal, and made upon a nominal pecuniary consideration, was binding in law, without other consideration. Again : it was conditional ; it was the grant of a license to enter upon his land, and lay out their railroad over it, at their option. If they should not take his land, he would be entitled to no further compensation. But further : as this was a

grant to them, on condition, of a license, with certain rights, interests, and easements in the land, there would be good ground to hold, that if they accepted and acted upon this grant, they were bound by the conditions, and that an action would lie for the money. As where a grant is made by deed poll, the grantee paying money, or performing any other condition, an acceptance of the grant binds the grantee to a performance of the condition, for which assumpsit will lie. *Goodwin v. Gilbert*, 9 Mass. 510.

But a more decisive and perhaps more satisfactory answer is, that the direct stipulation of the defendant was to execute a qualified, defeasible conveyance of the land to the company, on certain payments being made. The payment was a condition precedent, and the company could obtain no benefit from the agreement without first paying or tendering the stipulated rates of compensation. This was an ample security for the defendant, binding the company to a compliance with the agreement on their part, and renders the agreement reciprocal; and the condition subsequent, to be inserted in the deed to be made by him, rendering it void if the railroad over his land should be discontinued, was a sufficient guaranty that the grant would not continue when the land should cease to be appropriated to that public use.

That such an agreement, if fairly made, is a legal contract, and that it affords a proper ground for a decree for specific performance in equity, we can have no doubt.

In executing public works, where private property must be taken for public use, the cost of the work, as affected by the compensations thus to be paid, enters largely into the consideration, both of the legislature and of those agents and commissioners who may be intrusted with the consideration of the subject, in determining, first, whether the work shall be undertaken at all, and, if so, then what route shall be selected. Such a decision must be influenced mainly by a comparison of the expense with the utility of several proposed routes. If it is to pass over lands covered with dwelling-houses, or otherwise of great value and cost, it would be a strong inducement to the adoption of a less expensive route, or operate as a decisive objection to the enterprise. But the owners themselves know the value of the property, and the prices at which they are willing to part with it, for the accomplishment of the proposed object, taking into consideration the advantage, if any, which it may confer on their other property. A previous contract, stipulating

provisionally for a grant of the land, or of a right of way over it, on certain specified terms, is well calculated to give authentic information, to prevent all mistakes and misunderstanding arising from mere verbal propositions and representations, and to secure the rights of all parties.

Taking such a contract, when fairly made, on good consideration, without fraud or duress, to be perfectly legal and equitable, a specific performance, by a decree in equity, is plainly the only *adequate remedy* that such a public corporation could have. The use of the land, when the location is fixed, is absolutely essential to their franchise, and a compensation in damages, in an action at law, would afford them no relief. Indeed, the right to the use of the land, for a public purpose, is secured by the constitution and laws of the land, independently of any contract; and by their act of incorporation vested in the company, for the use of the public; and if a specific performance of the agreement, on the part of the land-owner, were not given in equity, and the result were that he should obtain his damages in the mode pointed out by the statute, if they should exceed the amount stipulated for in the agreement, the company, in an action at law, on the contract, would recover back the same amount in damages. If, therefore, the agreement is a valid and equitable one, this remedy, by specific performance, ought to be allowed, to avoid circuitry of action.

With these considerations in view, the court have considered the subject as one of fact upon the evidence. There is considerable conflict of evidence, especially as to what took place at the defendant's house when the agreement was executed. Without stating the evidence at large, which is quite voluminous, the conclusions which we have come to, are these: That there was no fraud or false representation on the part of the company's agent; that the route, described in the agreement, was clearly and definitely stated as the west line, or Child's line, and was known to, or might easily have been known to, Babcock, the defendant, and was at least as well known to him as to the agent; that this was the line ultimately adopted by the company as the route of their road; that the agreement was read over to the defendant, before he executed it, with an honest purpose to enable him fully to understand it; that there was no mistake on the part of the defendant as to the route expressed in the agreement; and that, if he was induced, from any cause, to suppose that the company would not pursue the route they did,

but adopt another, which he supposed would be more beneficial to them, and better for him, it is not a mistake into which he was led by the company's agent, nor one which affects this agreement.

And the result of the opinion of the court is, that the agreement is valid in law, that the defendant has shown no sufficient grounds to excuse him from a performance in a court of equity, and therefore that the complainants are entitled to a decree for such specific performance.

After the foregoing opinion was delivered, the counsel for the defendant moved for a rehearing. The motion was granted, and another argument was addressed to the court, in behalf of the defendant.

SHAW, C. J. A rehearing of the cause has been had, before the full court, upon several grounds. 1. That the complainants are chargeable with laches in not having commenced their suit earlier.¹ Under the circumstances, we can see no ground for this objection. By the location, the complainants are and have been in the possession and actual use of all the privileges which the performance of the defendant's agreement would give them, and all which they have occasion for; and all which they seek by this suit is a confirmation, by the deed stipulated for, of these privileges, as their right.

2. That the company do not show that they accepted the defendant's contract until this suit was commenced. We understand that Mr. Morris was the authorized agent of the company, and that the deed to them was made pursuant to the instructions given him for that purpose, and therefore the delivery of the defendant's deed to him was a delivery to the company, and his acceptance of the deed was an acceptance by the company. By such acceptance, the company were bound to the performance of the stipulations in it, on their part to be performed. The court are asked, by way of test, whether the defendant could have maintained an action against the company, as soon as they had located their road over his land, and taken possession of it, at the rates stipulated for in this contract. We think he could, and that this follows from the principle already stated, viz., that the grantee, in a deed poll, is

¹ The defendant's counsel, on this point, cited *Watson v. Reid*, 1 Russ. & Mylne, 236.

bound, by its acceptance, to the performance of conditions stipulated to be performed on his part; and such obligation not arising from specialty on his part, *assumpsit* will lie to enforce it.

3. Another ground is inadequacy of consideration, because the damages are so much greater than were contemplated when the contract was made. Undoubtedly gross inadequacy of consideration is a good reason for not enforcing the specific performance of a contract. It is somewhat difficult to deal with this question of inadequacy of consideration, when the circumstances are so changed by the location of the railroad itself. At the present time, the business of the vicinity may have greatly increased, and the value of all the lands adjacent or near to the railroad must be estimated as it is enhanced by the establishment of such a great public work and thoroughfare in its neighborhood; whereas, at the time this contract was made, it was valued as plough-land, mowing, pasture, and wood land. It was at a time when the company had some latitude of choice in determining where to build this great public work, and especially as to the precise route they would adopt. Besides, the defendant, when the route was uncertain and unsettled, might be induced, very justly and wisely, to offer his land at an under valuation, in respect to the enhanced value of the residue of his property, to be effected by the location of this road in that direction. So far as this had any influence, if it had any, it was a consideration for the defendant's contract, in addition to the pecuniary compensation to be paid for the land, and renders it more difficult to draw any conclusion of inadequacy of consideration from the stipulated rates of payment for the different kinds of land taken. Under these circumstances, we are of opinion, that to invalidate this contract, the inadequacy of consideration must be so gross, and the proof of it so great, as to lead to a reasonable conclusion of fraud or mistake; and we can perceive no such proof, nor any thing approaching to it.

4. Another ground relied on is, that, in the opinion formerly given, the court intimated that in case Babcock should receive a larger amount of compensation, by the award of commissioners, or the verdict of a jury, than he had stipulated by his contract to accept, the company, in an action at law on the contract, would have a right to recover back the difference; and this is supposed to be incorrect.

That proposition was not necessary to the decision of the cause,

and it was put by way of illustration, in order to strengthen the conclusion that this was a fit case for a specific performance of the defendant's contract by a decree in equity, for this, among other considerations, that a suit at law would lead to the same result, by a circuity of action.

Our view was this: Supposing the defendant's contract to be a valid and legal one, subject to no legal or equitable objection, then he was bound by it to execute a deed to the company, on payment of the stipulated compensation for his land; and his refusal to do so, on demand and tender, would be a breach. In a suit at law, on such breach shown, the plaintiffs would be entitled to recover such sum as would indemnify them for the actual and direct loss sustained by the non-performance of the contract. Such we understand to be the rule of law in regard to damages. There may be a difficulty in fixing this by proof; but, when fixed, it is a rule of law as certain as the rule of damages on the non-payment of a note of hand. Such is the rule of damages on breach of a covenant of seisin or right to convey, when no estate passes; it is the sum actually paid, because that is the sum actually lost by the breach. *Bickford v. Page*, 2 Mass. 455; 4 Kent Com. (3d ed.) 474, 475. If the consideration actually paid cannot be ascertained, the damages shall be determined as nearly to it as the proof will admit. *Smith v. Strong*, 14 Pick. 128. Where a party stipulated to give his land for a public improvement, the value of the land was deducted from his other damages sustained, in an application for damages. *Foster v. Boston*, 22 Pick. 33. So in a covenant against encumbrances, the sum actually paid to remove the encumbrance is the measure of damages. *Prescott v. Trueman*, 4 Mass. 627; *Brooks v. Moody*, 20 Pick. 474. Indeed, the rule is too familiar to require many authorities to be cited in support of it.

Now, the view of the court was, that if the defendant here could proceed and obtain an award for damages larger than the sum which, by his contract, he had stipulated to take, then the loss sustained by the plaintiffs would be the difference between what they should thus be compelled to pay, under the award of commissioners, and the sum the land-owner had agreed to receive in full satisfaction. That sum would be the exact amount of their loss; and of course that sum would be the measure of their damages, in a suit for breach of this contract. It still appears to us that this is a correct view of the subject, and that, under the circumstances of

this case, a decree for a specific performance will bring the parties to the same result to which they would come by a circuitry of action, if it were refused.

We are aware that this is not the result in ordinary cases, and depends upon the peculiar circumstances of this case. Ordinarily, when a decree for a specific performance of a contract to convey lands is refused by a court of equity, for any cause, the covenantor holds and retains the land, and the covenantee's only remedy at law is to recover a sum of money in damages. But, in the present case, the complainants have a right by law to take and hold the land for public use, to the same extent which they could do by force of the contract, and the landholder's only remedy would be to recover a sum of money as compensation for his land. When the sum which he should thus recover by the award of commissioners comes to be compared with the amount to be received by the contract, the difference is mere matter of computation; and if the owner of the land had gained any thing by the operation, it would be a gain in money, and a gain precisely commensurate with the company's loss. But, in either event, whether by the operation of law, or by force of a decree for specific performance, the company holds the land.

Several other considerations were brought to the attention of the court, in behalf of the defendant, on the rehearing, which have been fully considered; but upon the best deliberation which they have been able to bestow upon a revision of the whole subject they adhere to the opinion formerly expressed, that the plaintiffs are entitled to a decree for specific performance.

EMINENT DOMAIN. — LAND TAKEN FOR PUBLIC USE ON MAKING
COMPENSATION. — RAILWAYS PUBLIC USE.

Beekman v. Saratoga and Schenectady Railway Co., 3 Paige's Reports, 45.

The eminent domain remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have the right to resume the possession of property of individuals not only where the safety, but also where the interest or even the expediency, of the state is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement.

The only restriction upon this power in cases where the public, or the inhabitants of any particular section of the state, have an interest in the contemplated improve-

ment as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner in the mode prescribed by law. It rests in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*.

THIS was an application by the complainant for an injunction to restrain the defendants from taking possession of that part of his premises over which their railway had been laid out.

OPINION.

WALWORTH, CHANCELLOR. There can be no doubt in this case of the right of the company to lay out the road in the manner they have done, and to take the property of the complainant for that purpose, provided the authority given by the act and the mode of compensating the owners of land through which the road is to run are not in violation of the constitution of this state. Even if the validity of this act were doubtful, I am not prepared to say the verbal contract proved by two or three witnesses, and acted on by the agents of the company, would not be sufficient to preclude the complainant in a court of equity from raising that question. There is no doubt that it was competent for the legislature to authorize the company to agree with the owners of land through which the road was to run for a conveyance or donation of the lands necessary for that purpose; and it would be both inequitable and unjust for an individual who had consented to give the site of the road provided it should run through his land, to retract that consent after the company had, in reference to such agreement, contracted with the owners of other lands on that particular route. And if such consent was not in fact retracted before the directors of the company had made their certificate of location, so as to preclude themselves from laying out the road elsewhere, it would be the duty of this court to compel a specific performance of the verbal agreement made with them before that time. I infer, however, from the affidavits in this case that the complainant altered his mind, and retracted his consent to the location of the road on his premises at any place west of the barn, before the second of September, when the certificate of location was signed by the directors.

The Constitution of the United States does not come in question in this cause. It is admitted that the complainant held the land in fee; and probably under a title derived from the crown, to the

rights of which the people have now succeeded. A law declaring the grant from the crown void, and divesting his title on that ground, would impair the obligation of the contract. But it was no part of the contract between the crown and its grantees or their assigns, that the property should not be taken for public use, upon paying a fair compensation therefor, whenever the public interest or necessities required that it should be so taken. All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency, of the state is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement. The only restriction upon this power, in cases where the public or the inhabitants of any particular section of the state have an interest in the contemplated improvement as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. The right of *eminent domain* does not however imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. And if the legislature should attempt thus to transfer the property of one individual to another, where there could be no pretence of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual, or to those under whom he claimed title, and repugnant to the Constitution of the United States. But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose. (2 Kent's Com. 340.) It is upon this principle that the legislature of several of the states

have authorized the condemnation of the lands of individuals for mill-sites, where from the nature of the country such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise. And according to the opinion of Chief Justice Marshall, in the case of *Wilson v. The Black Bird Creek Marsh Company* (2 Peters, 251), measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the states, provided they do not come in collision with those of the general government. It is objected, however, that a railroad differs from other public improvements, and particularly from turnpikes and canals, because travellers cannot use it with their own carriages, and farmers cannot transport their produce in their own vehicles; that the company in this case are under no obligation to accommodate the public with transportation; and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveller to go from one place to another without the expense of a carriage and horses, he derives a greater benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance has been discovered by which the farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there is no reason why the public should not enjoy the benefit of the discovery. And if any individual is so unreasonable as to refuse to have the railroad made through his lands for a fair compensation, the legislature may lawfully appropriate a portion of his property for this public benefit, or may authorize an individual or a corporation thus to

appropriate it, upon paying a just compensation to the owner of the land for the damage sustained. The objection that the corporation is under no legal obligation to transport produce or passengers upon this road, and at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may also from time to time regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road.

The mode of ascertaining damages by commission has been adopted by the legislature in a great variety of cases; and I can see nothing in the provisions of the constitution which render such a course exceptionable. It was well known to the framers of the new constitution that such had been the practice in relation to the assessment of damages for private property taken for the Erie and Champlain Canal, and for a great number of turnpike roads, as well as for other public uses. When, therefore, the constitution provided that private property should not be taken for public uses without just compensation, and without prescribing any mode in which the amount of compensation should be ascertained, it is fairly to be presumed the framers of that instrument intended to leave that subject to be regulated by law, as it had been before that time; or in such other manner as the legislature in their discretion might deem best calculated to carry into effect the constitutional provision, according to its spirit and intent.

The provision of the constitution which declares that the right of trial by jury in all cases in which it has heretofore been used shall remain inviolate for ever, relates to the trial of issues of fact in civil and criminal causes in courts of justice, as is evident from what follows this provision in the same section; and it has no relation to cases of the kind now under consideration. Although the writ *ad quod damnum* had sometimes been used for the purpose of assessing damages where individual property was taken for public

use, yet that was never considered a jury trial within the meaning of the constitution. There is no doubt that it is a very proper mode of estimating damages in such cases; and probably where a single assessment was to be provided for, it would be much the most judicious and satisfactory mode of fixing the amount.

I have no doubt of the constitutionality of the statute under which the property of the complainant has been taken; and as all the requisites of the statute have been complied with, this property has been taken by due course of law, and after making just compensation therefor. From the moment that compensation was paid or deposited as the law had directed, the right to this property was absolutely vested in the defendants for the use of the railroad, and they have a perfect right to enter upon it and appropriate it to that use.

The order to show cause why an injunction should not be issued must be discharged with costs, and the temporary injunction heretofore granted in this case must be dissolved.

See also, on same subject, the opinion of the Chancellor, in *Bloodgood v. The Mohawk and Hudson Railway Company*, *infra*.

RIGHT OF ENTRY FOR PRELIMINARY SURVEYS AND OTHER PURPOSES.

Bloodgood v. The Mohawk and Hudson Railway Co., 18 *Wendell's Reports*, 9.

The legislature have the constitutional power to take private property for the purpose of making a railroad or any other public improvement of the like nature, upon paying a just compensation for such property, whether such public improvement is made by the agents of the state, or through the medium of a corporation or joint-stock company. But the exercise of the power to take private property, even for uses which are confessedly public, should not be resorted to in any case, unless the benefit which is to result to the public is of paramount importance in comparison with the individual loss or inconvenience, and an ample and certain provision should always be made for a full and adequate compensation to the individual whose property is thus taken.

Where the section in the charter of the defendants authorizing them to take the land of individuals for the purposes of their road contained a proviso that lands so taken should be purchased by the company, and in case of disagreement as to the price, the damages should be determined by commissioners; it was *held*, that the proviso was a condition precedent, and the company, justifying their entry upon the lands under this section, must aver in their plea the assessment and payment of the damages before they entered upon the plaintiff's land and appropriated it to the use of the company.

THIS was an action of *trespass quare clausum fregit*. The defendants justified under their act of incorporation, the 7th section of which enacted as follows: "That the said corporation be and they are hereby authorized, by their agents, surveyors, and engineers, to cause such examination and surveys to be made of the ground lying between the Mohawk and Hudson rivers within the aforesaid limits, prescribed by the *first* section of this act, as shall be necessary to determine the most advantageous route, place, or places for the proper line, course, road, and way whereon to construct their single or double railroad or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double railroad or ways, and the accommodations requisite and appertaining to them; and may also receive, hold, and take all such voluntary grants and donations of land and real estate as shall be made to the said corporation, to aid in the construction, maintenance, and accommodation of their single or double railroad or way: Provided, that all lands or real estate thus entered and taken possession of, and used by the said corporation, and which are not donations, *shall be purchased by the said corporation* of the owner or owners of the same, *at a price to be mutually agreed upon betwixt them: and in case of a disagreement of the price*, it shall be the duty of the governor of the state, upon a notice to be given him by the said corporation, *to appoint three commissioners, &c., to determine the damages* which the owner or owners of the land or real estate so entered upon by the said corporation has or have sustained by the occupation of the same, and *upon payment* of such damages and certain costs, then the said corporation shall be deemed to be seised and possessed of the fee simple of all such land or real estate as shall have been appraised by the said commissioners; and it shall be the duty of said commissioners or a majority of them to deliver to the said corporation a written statement of the award or awards they shall make, with a description of the land or real estate appraised, to be recorded by the said corporation in the clerk's office of the county where the land or real estate may lie." The defendants pleaded that they made the entry on plaintiff's close, and for the purpose of making surveys for their route and for constructing their road, without averring that the damages had been regularly assessed and paid before the defendants entered upon the plaintiff's land and appropriated it to the use of their road.

OPINION.

WALWORTH, CHANCELLOR. The first and most important question in this case is, as to the constitutional power of the legislature to authorize the taking of private property for the use of a railroad, upon paying a just compensation to the owner for the property thus taken. In the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, 3 Paige, 45, which came before me in another court, I decided that railroads for the conveyance of travellers, or the transportation of merchandise from one part of the state to another, were public improvements and for the public benefit, for the construction of which private property might be taken under the authority of the legislature, upon paying a just compensation therefor to the owners. That the *eminent domain*, or the right to resume the possession of private property, for the public use, upon paying a just compensation therefor, remained in the government or the people in their sovereign capacity; and that such right of resumption might be exercised, not only for the public safety, but also where the interest or even the convenience of the state or of its inhabitants were concerned, as for the purpose of making turnpike and other roads, railways, canals, ferries, and bridges for the accommodation of the public. That it belonged to the legislative power of the state to determine whether the benefit which the public were to derive from such improvements were of sufficient importance to justify the exercise of this right of *eminent domain*, in thus interfering with the private rights of individuals; and that the right itself might be exercised by the government through its immediate officers or agents, or indirectly through the medium of corporate bodies or private individuals. The reasons upon which these conclusions were founded, are stated at length in the report of that case, and it is therefore unnecessary to repeat them here. In the subsequent case of *Varick v. Smith and the Attorney General*, 5 Paige, 137, I also arrived at the conclusion that this right of *eminent domain* did not authorize the government to take the property of one citizen for the mere purpose of transferring it to another, even for a full compensation, where the public was not interested in such transfer; and that such an arbitrary exercise of power would be an infringement of the spirit of the constitution, as not being within the powers delegated by the people to the legislature. To justify the exercise of the right,

there must be a necessity, or at least an evident utility, on the part of the public. Ersk. Inst. B. 2, tit. 1, § 2; Per *Lane J.*, 4 Ohio, 286; Per *Green J.*, 3 Yerg. 52. Upon a further argument and examination of this subject, I have seen no reason to change the opinion I had expressed in the cases above referred to. On the contrary, since the decision in the case of *Beekman v. The Saratoga and Schenectady Railroad Company*, decisions have been made in the courts of some of our sister states, which have tended to confirm my views of this constitutional question. In the case of *Cottrill v. Myrick*, which came before the Supreme Court of Maine in 1835, 3 Fairf. 222, it was claimed that the property, an alleged private right of fishery, which had been opened and improved for the benefit of the inhabitants farther up the stream, was not taken for public use, because the profits and emoluments of the improved fishery were granted to the inhabitants of two particular towns; but the court, in answer to this objection, said, "The public had an interest in the preservation and regulation of the fishery, and in the removal of obstructions by which it might be impaired or destroyed. This was best effected through the agency of persons appointed by the neighboring towns, and by quickening and rewarding their diligence by a grant of the profits. It is a course of proceeding adopted by the legislature in many other cases, the authority of which has not been questioned. If public purposes and uses were to be promoted, as they undoubtedly were in the case before us, it was no objection to the power of appropriation by the legislature that it contributed also to the emolument or advantage of individuals or corporations. Many cases of this character exist, in which the legislative power is well established." And the court refers to the case of the right granted by statute in that state and in Massachusetts to the owners of mills to raise a head of water necessary for their operation, although the lands of others are thereby injured and rendered unproductive, ample provision having been made by law for compensating the owners of such lands for the injuries which they may sustain. A similar decision upon this constitutional question was made by the Supreme Court of Alabama in 1835, in the case of *Dyer v. The Tuscaloosa Bridge Company*, 2 Porter, 296, where a corporation was authorized by the legislature to take private property for the site of a bridge and to make a passage to the same. A similar power has been exercised by the legislature of this state for the

last fifty years in relation to turnpike roads, toll bridges, &c., without question, and also by the legislature of nearly every state in the Union. In the case of *Harding v. Goodlett*, 3 Yerger, 41, to which this court were referred on the argument, which came before the Supreme Court of Tennessee in 1832, it was held that the law of that state authorizing the taking of the land of an individual for the erection of a grist-mill thereon, at which all the inhabitants of the neighborhood should be entitled to have their grinding done in turn and at fixed rates, was such a public use as to authorize the exercise of the right of *eminent domain*, although the whole property and profits of the mill were to belong to the individual proprietor thereof. It is true, in that case, each individual could not be permitted to go to the mill and grind his own grist, but still it was the public utility of having such a mill, where each individual had an equal right to be served, which authorized the taking of the private property for such a purpose, upon payment of a full compensation for the same. So in the case of a ferry or railroad, although each member of the community cannot cross the river in his own ferry-boat, or ride upon the railway in his own car or travel thereon with his own locomotive engine, he has an unquestionable right to cross the ferry in the usual way, or to travel on the railway in the accustomed mode of travelling thereon, paying the ordinary toll or fare: and the proprietors of the ferry or the railway would be liable to an action for damages if they refused, without sufficient cause, to permit him to exercise this right. It might as well be objected that a canal, made by an incorporated company, was not a public improvement, because each individual could not navigate it with a canal boat, or travel thereon with a steam engine; or that a turnpike road was of no public utility, because each citizen could not conveniently transport produce and passengers thereon with his wagon and horses. I have no doubt, therefore, of the constitutional power of the legislature to take private property for the purpose of making a railroad, or any other public improvement of the like nature, upon paying a just compensation for such property, whether such public improvement is made by the agents of the state, or through the medium of a corporation or joint-stock company. But the exercise of the power to take private property, even for uses which are confessedly public, should not be resorted to in any case, unless the benefit which is to result to the public is of paramount importance in comparison with the individual loss or inconvenience, and

an ample and certain provision should always be made for a full and adequate compensation to the individual whose property is thus taken ; and that legislator will best discharge his duty who exercises this power as seldom as possible, consistently with the real interests and general welfare of the state.

Another very important question which arises in this case is, whether the legislature in fact authorized the defendants to enter upon the private property of the plaintiff and to construct their railroad thereon before his damages were actually assessed and paid or offered to be paid to him ; and if such is the construction of the law, whether such a power is authorized by the constitution. In the case of *Rogers v. Bradshaw*, 20 Johns. 735, this court decided that where private property was taken for public use it was not necessary that the amount of the compensation should be actually ascertained and paid before such property was appropriated to the public use ; that it was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay. This decision has been followed by the courts of several of our sister states. To this extent the opinion of Chancellor Kent, in the case of *Rogers v. Bradshaw*, must be considered as the settled construction of the constitutional provision on this subject, at least in this state. I cannot, however, agree with my learned predecessor in his subsequent reasoning in that case, upon which he afterwards acted in the case of *Jerome v. Ross*, 7 Johns. Ch. 344, that it is not necessary to the validity of a statute authorizing private property to be taken for the public use that a remedy for obtaining compensation by the owner should be provided. On the contrary, I hold that before the legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation ; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. I do not mean to be understood that the legislature may not authorize a mere entry upon the land of another for the purpose of examination, or of making preliminary surveys, &c., which would otherwise be a technical trespass, but no real injury to the owner of the land,

although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for the public use. But it certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the state canal, such a remedy is provided; and if the town, county, or state officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road before his damages were assessed and paid, or offered to be paid to him, he might have been wholly without redress, as he has no power to compel the assessment of damages, and no adequate fund was provided for the payment of the damages when ascertained. The citizen whose property is thus taken from him without his consent is not bound to trust to the solvency of an individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void.

I cannot, however, agree with the learned judge who delivered the opinion of the supreme court in this case, that such is the fair and legitimate construction and meaning of the defendants' charter. It is a primary rule in the construction of statutes in those countries where the limits of the legislative power are restricted by the provisions of a written constitution, to endeavor if possible to interpret the language of the legislature in such a manner as to make it consistent with the constitution or fundamental law. Applying that principle to the statute under consideration, and having ascertained that it would be inconsistent with the fundamental law of the state, to authorize the defendants to take possession of the lands of an individual without having made an adequate and certain provision for the recovery of the damages which he would necessarily sustain by such permanent occupation of his property for the purposes of the road, there appears to be no difficulty in giving such a construction to this statute as will be consistent with the constitution and also with the probable intention of the legislature. This may be done effectually by considering what is very inartificially appended as a proviso to the seventh section, as in the nature of a *condition precedent*, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation. Indeed, such appears to me to be the more reasonable and fair construction of this section, independent of any constitutional difficulty in the way of a different construction. For upon the supposition that no injustice was intended by the legislature, it can hardly be presumed they meant to authorize the company to enter upon the lands of individuals, pull down their buildings, &c., and then take their own time to get the damages appraised and to pay the same; leaving the individuals injured thereby to seek for some uncertain remedy by action, if the company neglected to get the damages assessed within a reasonable time.

The conclusion at which I have arrived, therefore is, that the defendants' plea is imperfect in not averring that the damages had been regularly assessed and paid before the defendants entered upon the plaintiff's land and appropriated it to the use of the road; and that if they in fact entered and commenced the construction of the road before the damages were actually assessed and paid, the plaintiff has a technical right to recover in this action for all damages which he really sustained by such unauthorized entry, although

these requisites of the statute were afterwards complied with. In that case the defence arising from the subsequent assessment and payment of the damages, can only be pleaded to that part of the declaration which charges a continuance of the trespass after the damages were assessed and paid as required by the statute.

For these reasons I think the demurrer is well taken, and that the judgment of the supreme court should be reversed, with liberty to the defendants to amend their plea upon the payment of costs in this court and of the demurrer in the supreme court.

Cushman v. Smith, 34 Maine Reports, 247.

The clause in constitutions which prohibits the taking of private property for public use, was not designed to operate and it does not operate to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or an easement in it.

It was designed to operate and it does operate to prevent the acquisition of any title to land or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it.

That the right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it.

That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation unless compensation or a tender of it be made within a reasonable time after the commencement of such occupation.

That under such circumstances an action of trespass, or an action on the case, may be maintained to recover damages for all the injuries occasioned by the prior occupation.

OPINION.

SHEPLEY, C. J. The action is trespass *quare clausum*. The plaintiff is admitted to have been the owner of land, upon which the Buckfield Branch Railroad has been made. The alleged acts of trespass are admitted. The justification presented is, that the railroad was legally located, constructed, and used upon the plaintiff's land; and that the acts alleged to have been trespasses were done in the rightful use of that road.

The act creating the corporation authorized it to locate, construct, and complete a railroad on a prescribed course between certain places. It required that the corporation should "pay such damages as shall be ascertained and determined by the county commissioners for the county where such land or other property may be situated, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways." And it provided that the land so

taken should "be held as land taken and appropriated for public highways." The corporation, by its charter, is entitled to all the powers, privileges, and immunities, and subjected to all the duties and liabilities prescribed in the eighty-first chapter of the Revised Statutes. By that chapter it was authorized to take and hold so much real estate as might be necessary for the location, construction, and convenient use of the road. That statute provides, that when application for an estimate of damages is made, either by the corporation or by the owner of real estate, the commissioners, if requested by any such owner, shall require the corporation to give security to the satisfaction of the commissioners, for the payment of all such damages and costs as shall be awarded and finally determined by a jury, or otherwise, for the real estate so taken; and the right or authority of said corporation to enter upon or use said real estate, except for making surveys, is suspended until it shall give such security.

The plaintiff appears to have presented to the county commissioners at their session, held in the month of June, 1849, a petition to have his damages assessed. It contained a request, that the corporation should be required to give security for the payment of them. An assessment of damages was made by the commissioners, and entered of record at their session, held in the month of December, 1849. At their session held in the month of June, 1850, the plaintiff united in a petition with others to have his damages assessed by a jury. The parties agreed upon a committee instead of a jury, and that committee made a report of their revision and assessment of damages at the session of the commissioners held in the month of December, 1850; and an order was then made that the corporation should give security for payment of the damages awarded. A warrant for collection of the damages issued on Feb. 6, 1851, which was returned on April 28, 1851, in no part satisfied. The damages awarded have never been paid or tendered; nor has any security been given for their payment.

The provision of the statute, authorizing petitions for the assessment of damages to be presented at any time within three years, and not afterwards, and that requiring that the damages should be assessed as in laying out of highways, and that respecting security for their payment, clearly indicate that it was not the intention of the legislature to require an assessment and payment of damages to be made before an exclusive occupation of the land was authorized for the purpose of making the road.

If such be a correct construction of the act, and of all other acts,

respecting the construction of railroads in this state, deriving their powers from the general act regulating the construction and use of such roads, the public must suffer great inconvenience if they must be regarded as in conflict with any provision of the constitution. If a railroad or highway cannot be established and constructed without a previous assessment and payment or tender of damages, great obstacles and delays will be interposed to prevent the completion of such public improvements.

These considerations would however afford no justification for an attempt to uphold such statute provision, and to continue the long established course of proceedings, in violation of any provision of the constitution.

There has been a serious difference of opinion respecting the requirements and construction of those constitutional provisions, which declare in the same or similar terms that "private property shall not be taken for public uses without just compensation."

How far legislation may proceed to authorize acts to be done without first making or tendering compensation, and where it becomes arrested by the provision, has been considered by many of the ablest men and most distinguished jurists of the country. And yet there is an indication arising out of the conflict of opinion, and the difficulty of reconciling the positions attempted to be established with each other, and with any sound and pervading principle, that the whole truth has not been reached.

The more thoroughly it has been examined in connection with legislative enactments, the more clearly has it been perceived that serious difficulties or inconveniences or losses may arise in the rigid and uniform application of any suggested construction to the proceedings required in all classes of public improvements. How can a construction be correct which will allow acts to be done for the purpose of making one kind of public improvement, and prohibit the like acts to be done under like circumstances for the purpose of making another kind of public improvement? which will authorize acts for the purpose of making a public highway, and prohibit them for the purpose of making a railway; which will authorize them for the purpose of making a canal or railway, when made by a state, county, city, or town, and prohibit them when the same public improvement is made by a private corporation? And yet such may be the effect of many, if not of most, of the constructions suggested or insisted upon. If, upon principle and sound

reasoning, the provision must operate alike upon the construction of all classes of public improvements made by the appropriation of private property to public use, the effect of any proposed construction of the clause may be examined in its practical operation, to ascertain if such could have been the intention of the framers of the constitution.

If the construction be such as to require payment in all cases for private property so taken before it can be exclusively *occupied* for public use, the result must be that no such improvement can be effectually or beneficially commenced even by a state, county, city, or town, without waiting to have an assessment of damages first made for each person, whose estate is in some degree to be occupied upon the whole line of the contemplated improvement.

Such a construction would prevent the laying out and making of highways and streets over private estates believed to be benefited and not injured thereby, before there had been an adjudication obtained, that no damages were occasioned; and it would deprive persons thinking themselves aggrieved by such an adjudication or by one estimating the damages to be too little in their judgment, from having such adjudications revised and finally determined by some other tribunal without delaying the progress of the public improvement.

It is believed to have been the long established course of proceeding, in this part of the country at least, to authorize the exclusive *occupation* of land required for such public uses as the laying out of highways and streets, by making provision by law for compensation to the owner, to be subsequently paid, and in many cases authorizing the damages to be finally ascertained as well as paid subsequently. This course of proceeding existed, so far as is known, without complaint, long before the Revolution, which cast off the British dominion; and of course was well known to the framers of the constitution which first contained this prohibitory clause for the protection of private property. Was it the intention to interrupt such course of proceeding and to provide a remedy for a grievance already experienced, or only to prevent private property from being taken from the owner and permanently appropriated to public use without compensation? Constitutional provisions are often and legitimately explained by considering the actual state of facts at the time of their adoption. Thus the provision in the Constitution of the United States for the regulation of commerce is ex-

plained to include navigation, by reference to the state of facts existing at the time. By these, or other considerations, many minds appear to have been led to the conclusion that private property might be absolutely taken and permanently appropriated to public use without compensation being first made, when provision was made by law for compensation to be subsequently made from the treasury of the state, or of a county, city, or town.

Does experience teach that the owner, in such cases, will always be certain to obtain compensation? History informs us that kingdoms and states have not always paid their just debts in full, that they have often paid them only in promises which would not command gold or silver without a large discount.

When the private property of citizens residing in a county, city, or town may be taken to pay the debts of the corporation, there may be reason to expect that its debts will be certainly paid. But the law making private property liable to be taken for payment of the debts of such corporations may at any time be repealed or altered; and the corporation in its corporate capacity may not have property from which payment can be obtained.

Is the distinction attempted to be made between taking private property without first making compensation, when provision is made for payment by a state, county, city, or town, and when it is made for payment by a private corporation, a sound one? Can that be a correct construction of the provision, which would authorize legislation by which the owner of an estate might be deprived of it without being first paid, whenever in the judgment of some court or tribunal it might be morally certain that he could afterwards obtain compensation; and which would not authorize it whenever in the judgment of such court or tribunal it was not so certain that he could obtain it? That would make the title pass from the owner to the public use, not upon payment of compensation, but upon the opinion of certain official persons that a fund or other means had been provided from which he might obtain payment. If such be a correct construction, it would follow that the title to private property may be made to pass from the owner to a private corporation for public use, when that corporation should be found to possess the means or to furnish security which would render it as certain that compensation could be subsequently obtained from it as from the treasury of a state, county, city, or town.

These and other considerations present themselves as serious objections to a construction, which would permit an owner of property to be deprived of it without compensation actually paid or tendered to him, whether it be taken for public use by a state, county, city, town, or private corporation.

If such a construction be inadmissible, as well as one which would prevent an exclusive occupation of a temporary character, without payment of compensation, the inquiry is suggested, whether by a correct construction such results may not be avoided.

This provision of the constitution was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceeding to be pursued to take private property and appropriate it to public use; nor to prevent its exercise to determine the manner in which the value of such property should be ascertained and payment made or tendered. The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor.

The provision was not introduced or intended to prevent legislation authorizing acts to be done, which might be more or less injurious to private property not taken for public use. It is not unusual to find that private property has been greatly injured by public improvements when there has been no attempt to take it for public use. The records of judicial proceedings show that private property in railroads, turnpike roads, toll bridges, and ferry ways has been often greatly injured, and sometimes quite destroyed, by acts authorized by legislation, which, according to judicial decisions, did not violate any provision of the constitution.

Private property is often injured by the construction and grading of highways and railways when no attempt has been made to change its character from private to public property. The cases of *Day v. Stetson*, 8 Greenl. 365; *Callender v. Marsh*, 1 Pick. 418; *Canal Appraisers v. The People*, 17 Wend. 571; and *Susquehanna Canal Co. v. Wright*, 9 Watts & Sergt. 9, present examples of it.

The provision was not designed, and it cannot operate, to prevent legislation which should authorize acts operating directly and injuriously as well as indirectly upon private property when no attempt is made to appropriate to public use. An instance of this

kind of legislative action will be found in the case of the Commonwealth *v. Tewksbury*, 11 Met. 55, where a person was held indictable for the removal of gravel from his own land contrary to a statute provision, which did not assume to appropriate to public use or to make compensation for it.

The design appears to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others, for public use, without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements; not to prevent its temporary possession or use, without a destruction of it or a change of its character. It was designed also to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation. While it was not designed to prevent legislation which might authorize acts upon it which would by the common law be denominated trespasses, including an exclusive possession for a temporary purpose, where there was no attempt to appropriate it to public use. Such acts of legislation might be very unjust, and it may be presumed that no legislative body would make such enactments without making provision for the compensation of injuries to private property occasioned by acts designed to promote the public good. The claim upon the justice of the state for compensation might be perfect, while compensation would not be secured by any provision of the constitution.

If this provision of the constitution does not prevent enactments authorizing an exclusive possession of land owned by an individual for a temporary purpose, without compensation, when there is no attempt to appropriate it to public use, will it operate to prevent an exclusive occupation of it temporarily as an incipient proceeding to the acquisition of a title to it or to an easement in it? Will it prohibit legislation authorizing acts to be done when the intention is by them and by other means to be adopted to secure finally a title to the land or to an easement in it for public use, and allow the same acts to be done upon the same land when done without any such intention? Was it the design to make the intention with which the act was performed the criterion to determine whether it could or could not be authorized by the legislative department?

This leads to a further inquiry to ascertain the sense in which the word *taken* was used in the constitution.

That word is used in a variety of senses, and to communicate ideas quite different. Its sense, as used in a particular case, is to be ascertained by the connection in which it is used, and from the context, the whole being applied to the state of facts, respecting which it was used.

It cannot well be denied, and it is generally admitted, to have been used in constitutions containing this clause to require compensation to be made for private property appropriated to public use, by the exercise on the part of the government of its superior title to all property required by the necessities of the people to promote their common welfare.

This appears to have been denominated the right of eminent domain, of supereminent dominion, of transcendental propriety. These terms are of importance only to disclose the idea presented by them, that the right to appropriate private property to public use rests upon the position that the government or sovereignty claims it by virtue of a title superior to the title of the individual, and that by its exercise the individual and inferior title becomes wholly or in part extinguished: extinguished to the extent to which the superior title is exercised. To take the real estate of an individual for public use is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion.

The exclusive occupation of that estate temporarily, as an initiatory proceeding to an acquisition of a title to it, or to an easement in it, cannot amount to a taking of it in that sense. The title of the owner is thereby in no degree extinguished. He can convey that title while thus exclusively occupied as he could have done before. Should he do so by a conveyance containing a covenant that it was free of all encumbrances, that covenant would not make him liable for such an exclusive occupation unless it be admitted that a title to the land or to an easement in it can be acquired without making compensation, and this is denied.

A construction of the provision which would permit legislation authorizing private property to be exclusively occupied without first making compensation as an incipient proceeding to the acquisition of a title to it, or to an easement in it, and which would not authorize the title of the owner to be extinguished or impaired

without compensation, may be somewhat novel, but it will not be found to be unsupported by positions asserted and maintained in judicial opinions. It is generally admitted in them, that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision, and without provision for previous compensation. Where is to be found the limit of the legislative power to authorize trespasses of a more extensive and injurious character, which do not extinguish or intrench upon the title of the owner? Does that provision of the constitution permit the legislative power to authorize trespasses not very injurious to private property without providing for previous compensation, and prohibit it from authorizing those of a little more or much more injurious character, which do not in any degree impair or affect the title of the owner? It was not the intention to make the exercise of the legislative power depend upon the extent of the injury, which the authorized acts might occasion, if the title was not invaded.

There are cases in which an opinion is expressed that all injuries to private property authorized by the legislative power can only be authorized by the exercise of the right of eminent domain; and that a temporary injury or occupation amounts to a taking of the property.

If it be admitted that such an injury or occupation of the property amounts to a taking of it, in the sense in which the word taken is used in the constitution, it will follow that measures must be taken to ascertain the damages occasioned thereby, and that compensation must be actually made before it can be so injured or occupied; or that the right to do it without compensation first made must be admitted, leaving the party injured to the chance of obtaining compensation as he may best be able. If the former alternative be adopted, private property cannot be injured or temporarily occupied, however urgent and immediate may be the public necessity, without waiting for the final completion of all proceedings to ascertain the compensation. And how the amount of compensation can be satisfactorily ascertained before the acts occasioning damages have been performed, it is not easy to perceive.

If the latter alternative be adopted, and the right to cause a temporary occupation or injury be admitted before compensation is made, the party injured must depend upon a legislative provision for his compensation, and the prohibitory clause of the constitution

will fail to secure to him, with entire certainty, a compensation. In other words, it will of itself afford him no protection against such temporary injury or occupation, and would leave him in the position in which he would be by a construction of that clause; which would only protect him against a permanent appropriation of his property, or an extinguishment or diminution of his title to it.

Many of the judicial opinions urgently restrictive of the legislative power assert that the title to land taken or to an easement in it, cannot be transferred from the owner to others for public use without compensation actually made, that the acts of payment and of transfer are simultaneous. If this be true it is immaterial so far as it respects the acquisition of a title to land, or to an easement in it for public use, when compensation is made. It can only be material to insist that compensation shall be made before an exclusive occupation is permitted, to prevent a temporary inconvenience and loss. An attempt has already been made to show that such was not the design of the prohibitory clause.

In the case of *Callender v. Marsh*, 1 Pick. 430, the opinion states that the clause "has ever been confined in judicial application to the case of property actually taken and appropriated by the government."

In the case of *Hooker v. The New Haven and Northampton Co.*, 14 Conn. 146, *Williams*, C. J., says, that the canal being made in the place designated "and the damages assessed and paid, it became a canal legally authorized, and the company became vested with the legal right to the enjoyment of their property." And *Sherman*, J., says, "that the only limitation at common law or by any constitution to the legislative power over individual property is that what is taken must be paid for."

In the case of *Bradshaw v. Rogers*, 20 Johns. 103, *Spencer*, C. J., says, "It is true that the fee simple of the land is not vested in the people of the state until the damages are appraised and paid, but the authority to enter is absolute, and does not depend on the appraisal and payment."

In the case of *Bloodgood v. The Mohawk and Hudson Railroad Company*, 18 Wend. 9, *Maison*, Sen., insists that an entry and possession of the land taken in defiance of the rights of the owner, is a taking of it in the legal sense, and yet he admits that the "legal fee may not be in them."

In the case of *Baker v. Johnson*, 2 Hill, 342, the opinion states: "Although the absolute fee did not pass to the state until the ap-

praisement of damages, yet the right to enter and use the property was perfect the moment the appropriation was made." It is submitted that a payment as well as an appraisal should have been required to pass the title.

In the case of *The People v. Hayden*, 6 Hill, 359, the opinion states, "the statute places the right to have compensation made where the principle of the constitution places it; viz., upon the forcible divestment of the use and enjoyment of private property for the public benefit." If the divestment intended was of a permanent character there would be no objection made to it.

In the case of *Smith v. Helmer*, 7 Barb. 416, the opinion states, "It is sufficient for this case that the settled construction of the constitution which prohibits private property to be taken for public use without just compensation, actual compensation need not precede the appropriation."

In the case of *Rubottom v. McClure*, 4 Black. 505, it was decided that private property might be taken for public use, upon provision being made for a subsequent compensation.

In the case of *Thompson v. Grand Gulf R. R. Co.*, 3 How. Missis. 240, it was decided that compensation must be first made, the constitution of that state requiring that it shall not be taken "without a just compensation first made therefor."

In the case of *Pittsburg v. Scott*, 1 Penn. 309, it was decided that it was not necessary that compensation should be actually ascertained and paid before private property is appropriated to public use. That it was sufficient that an adequate remedy was provided by which compensation could be obtained without any unreasonable delay. To the construction of the prohibitory clause proposed, it may be objected that it will not prevent the exercise of legislative power to authorize the commission of serious injuries upon private property without making provision for compensation.

A construction so broad as to prevent this would greatly limit the legislative power, and bring it within a much narrower sphere of action than it was accustomed to claim and exercise without complaint before the constitutions containing this clause were framed. Reliance must be placed upon the justice of legislation, and upon the administration of the laws for a recompense for such injuries, and not upon a provision of the constitution not designed for such a purpose.

Another objection to this construction may be that the owner will not be able to recover compensation for the exclusive occupa-

tion of his land, and for the injuries thereby occasioned, when the proceedings are not so completed and compensation made as to transfer any title to land, or to an easement in it for public use.

This objection is believed to be founded upon an incorrect position. If compensation be not made within a reasonable time after the land has been exclusively occupied, the right to continue that occupation will become extinct. It being authorized only as a part of the proceedings permitted for the acquisition of title, when it becomes manifest by an unreasonable delay that the avowed purpose is not the real one, or that, if real, it has been abandoned, the measures permitted for that purpose will no longer be authorized, and if the occupation be continued after that time the occupants will be trespassers, and liable to be prosecuted as such. The damages occasioned before the right of exclusive occupation became extinct may be recovered by an action of trespass, or by an action on the case, containing in the declaration averments that an exclusive occupation was authorized for the purpose of acquiring title for public use, and that no such proceedings have taken place as would transfer any title within a reasonable time, with other suitable averments. If the occupants should be regarded as trespassers *ab initio*, it would not be, as has been supposed, because they had omitted to make compensation, but because they had continued to occupy or commit trespasses after it had become manifest that their avowed was not their real purpose, or after their real purpose had been abandoned.

It is not necessary to decide whether such an action could be maintained, for the distinction between the actions of trespass and case has been abolished in this state.

After some difference of opinion, it may now be regarded as settled, that enactments which authorize private property to be taken for public use must provide the means or course to be pursued to have compensation made for it.

The conclusions to which this discussion leads are:—

1. The clause in constitutions which prohibits the taking of private property for public use was not designed to operate, and if it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it.

2. It was designed to operate, and it does operate, to prevent the acquisition of any title to land, or to an easement in it, or to a

permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it.

3. That the right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land, or of an easement in it.

4. That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation, or a tender of it, be made within a reasonable time after the commencement of such occupation.

5. That under such circumstances an action of trespass, or an action on the case may be maintained to recover damages for all the injuries occasioned by the prior occupation.

In this case, as no compensation or tender of it was made to the plaintiff within a reasonable time after his estate was occupied by the corporation, no title to it or to an easement in it has been acquired, and the occupation, although legally commenced, has ceased to be legal.

As the corporation acquired no title to the land, or to any easement in it, the defendant could acquire none by his conveyance from that corporation.

Defendant defaulted.

A charter of a railway company authorizing it to purchase, or take and hold so much of the land of private persons, or other corporations, as may be necessary for the location, construction, and convenient operation of said railway; and the right to take, remove, and use for the construction and repair of said railway and appurtenances, any earth, gravel, stone, timber, or other materials on or from *the land so taken*, does not authorize the servants of that corporation to go upon lands *not taken*, under the charter, and in accordance with its provisions, and take materials therefrom for the construction of their road, against the will, and without the consent of the owners of such lands. *Parsons v. Howe*, 41 Me. 220.

Where the charter of a railway company provided that the company might enter upon any lands contiguous to the railway, or the works connected therewith, and take materials necessary for building or repairing the road; and providing, in case of disagreement between the owners of the land and the company as to the compensation to be paid, that the amount should be determined by commissioners, the court held that the commissioners need not be called out to appraise damages until after the materials had been ascertained; and that this was the only practicable mode of proceeding in such case if they would come as a reasonable and just determination in regard to such damages. And it was admitted such, from necessity, had been the practical construction put upon that provision of the charter. *Vermont Central Railway v. Baxter*, 22 Vt. 370. In this case the question was not made or considered by the court, whether the company itself had any right to take materials for building its road, beyond the

limits of the survey. But we should suppose if it was a question, it was one mainly of fact, depending upon the *necessity* for taking such materials.

In *Bloodgood v. Mohawk & Hud. Riv. Railway Co.*, 14 Wend. 56, the court say, "It has never been deemed necessary that the compensation which the constitution requires should be made for private property, when taken for public use, should be actually paid before entering upon, or taking possession of, the property. If legal provision for compensation is made, the spirit of the constitution is complied with, and the property which is required for public use may lawfully be entered upon and taken. I am not aware that this principle has ever been questioned. It has already been shown that it has been sanctioned by the legislature in the highway and canal acts. It is explicitly admitted by Judge *Spencer* and Chancellor *Kent*, in *Bradshaw v. Rogers*, 20 Johns. 104, 744; and again by Chancellor *Kent*, in *Jerome v. Ross*, 7 Johns. Ch. 343, 344; and by this court in *Wheelock v. Pratt*, 4 Wend. 650. And the opinion is strongly intimated in those cases, that a law would not be unconstitutional which authorized private property to be taken for public use, and entirely omitted to provide the mode of making compensation; and that the officers of government or other individuals, who should take possession of property under such circumstances, would not be trespassers; and that the owner would have a just claim for compensation, which it was to be presumed would be acknowledged by the legislature and finally paid." But most of the decisions require that some provision should be made to enable the land-owner to secure the price of his land before it can legally be taken from him.

PAYMENT OF PRICE AND OTHER CONDITIONS PRECEDENT MUST BE
COMPLIED WITH BEFORE LAND IS TAKEN.

Stacey v. Vermont Central Railway, 27 *Vermont Reports*, 39.

The Vermont Central Railway Company, under their charter, acquire no title to lands surveyed and designated for the use of their railway, or to any easement growing out of it, from the fact of their having so surveyed it, or by having placed their survey on record, or by having the damages appraised by commissioners and causing their award to be recorded.

The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purpose of constructing their road, and without compliance with it they may be enjoined in a court of equity, or prosecuted at law in an action of trespass.

If the company has no vested right to the land, the owner of the land has none to the damages awarded him for it.

OPINION.

ISHAM, J. This action is brought to recover damages which were appraised by commissioners, for taking the plaintiff's land for the use and construction of the Vermont Central Railroad. The survey of the road was made on the 4th of June, 1847, and was recorded in the town clerk's office, on the 5th of August in the same year.

The appraisal of damages by the commissioners was made on the 5th of January, 1849, and was recorded on the 6th of February, afterwards. No appeal having been taken within ninety days, as limited by the 8th section of the charter, that appraisal has become conclusive as to the amount of damages sustained, and, if the plaintiff is entitled to recover, will prevent any further litigation of that matter.

It appears from the case also, that in February, 1850, the defendants changed their line of road by locating the same on other land than that of the plaintiff, and upon which their road has been constructed. That alteration of their line of the road has superseded the necessity of taking the plaintiff's land on which the road was first surveyed. The right of the corporation to change the line of their road is given them by the 15th section of their charter, which provides that if the directors of that company, for any cause, shall deem it expedient, they may change the location of such parts of their road as they shall deem proper. That change in the line of their road, however, will operate as an abandonment of their former survey on the plaintiff's land, so that the company can no longer claim any right or interest in the land itself, or to any easement growing out of it, in consequence of that survey having been made. That doctrine has been expressly held in Massachusetts, in relation to highways. *Commonwealth v. Westborough*, 3 Mass. 406, and *Same v. Cambridge*, 7 Mass. 163, and the same effect, we think, will follow in cases of this character. The result is, that the plaintiff retains his land free from any encumbrance arising from that location or survey of the road. That abandonment of the line of the road over the plaintiff's land, however, does not necessarily supersede his claim for damages. The right to recover those damages, whether liquidated by the agreement of the parties or by commissioners, is not necessarily defeated by that act of the company. If the land has once been taken, if the company, for any period of time, have been seised and possessed of the land so appraised, or if the plaintiff has had, at any time, a perfected right to the damages awarded by the commissioners, a subsequent abandonment of that location, and the establishment of a new line for the road, will have no effect to defeat the plaintiff's claim for the damages which have been awarded to him. *Westbrook v. North*, 2 Greenl. 179; *Hampton v. Coffin*, 4 N. H. 517; *Harrington v. Comr's of Berkshire*, 22 Pick. 267; *Hawkins v. Rochester*, 1 Wend. 53. Under such circumstances the plaintiff would be enti-

tled, on the abandonment of that location, to the land free from any encumbrance of that character, and also to the damages which were allowed to him.

The important question in the case therefore arises, whether the Vermont Central Railroad Company have ever been seised or possessed of this land of the plaintiff's, and for which the award of the commissioners was made; or has the plaintiff ever had a vested right to the damages which were awarded on that survey of the road. The determination of these questions depends upon the construction which is to be given to the 7th section of the charter of this company. We obviously can derive but little aid on this subject from adjudged cases in other states, unless they have arisen upon some statutory provision, embracing substantially the specific provisions of that section of this charter. By that section it is provided, that when land or other real estate is taken by the corporation for the use of their road, and the parties are unable to agree upon the price of the land, the same shall be ascertained and determined by commissioners, together with the charges and costs accruing thereon, *and upon the payment of the same, or by depositing the amount in a bank as shall be ordered by the commissioners, the company shall be deemed to be seised and possessed of all such lands as shall have been appraised.* This provision is quite specific in stating what act on the part of the corporation vests in them a right to the land. They derive no title to the land or any easement growing out of it, from the fact of their having surveyed the road across the plaintiff's land, or having placed that survey on record, nor by having the damages appraised by commissioners, and causing their award to be recorded. The statute is express, that the payment or deposit of the money according to the award must be made before any such right accrues. Until that payment is made, the company have no right to enter upon the land to construct the road or exercise any act of ownership over the same. A court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. The survey and appraisal of damages are merely preliminary steps to ascertain the terms upon which the land can be taken for such purposes, if the company shall see fit to use the same for the construction of their road. If it is accepted, and the company conclude to take the land, that acceptance and that taking is consummated only by a payment or deposit of the money, for the use of the owner of the land, as awarded and directed by the commissioners. The case of the Baltimore & Sus-

quehanna R. Co. v. Nesbit *et al.*, 10 Howard, 395, is very decisive on this question. In that case land was taken by the company under a charter granted by the State of Maryland. Under a provision in their charter, the damages were assessed by a jury, and that assessment was confirmed by the court. In that case, as in this, the road was located, and the damages conclusively determined and settled, so that no further litigation could arise on that matter. In that case, as in this also, the charter provided, that the payment, or tender of payment of such valuation should entitle the company to the estate or land as fully as if it had been conveyed. The charter of that company and of this, in all particulars important upon this question, are substantially similar. The court remarked, "that it is the payment or tender of the value assessed by the inquisition which gives the title to the company, and consequently without such payment or tender no title could, by the very terms of the law, have passed to them." They further observed, "that it can hardly be questioned, that without acceptance *in the mode prescribed*, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption." The same doctrine was sustained in the case of Bloodgood v. Mohawk & Hud. R. R. Co., 18 Wend. 10, 19. In that case the company were authorized to enter upon the land and make such examinations and surveys as were necessary to determine the most advantageous route for the road, and to take the same for that purpose; provided, that all land so taken shall be purchased by the company of the owner, and in case of a disagreement as to the price or value of the land, commissioners were to be appointed to determine the same, *and upon payment of such damages with the costs, or depositing the same in a bank in the city of Albany, then the corporation shall be deemed to be seised and possessed of the land so appraised.* It will at once be perceived, that the provisions of that charter are not only similar in this respect to that of the Vermont Central Railroad Company, but that they are expressed in very similar language. The Chancellor remarked "that this provision should be considered in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation."

It is very clear, from these cases, that as the Vermont Central Railroad Company have never paid or deposited the amount of that award of the commissioners for the benefit of the plaintiff, as ordered by them, that the company have never acquired any right or title to the land appraised, or to any easement growing out of it; and that none can now be acquired under those proceedings. The abandonment of that location, and the adoption of a new route, and the construction of their road thereon, will prevent the acquisition of any such title or the perfection of any such right.

It is insisted, however, that though the corporation have no right to the land, and have never been seised or possessed of the same, yet that the plaintiff, under the provisions of that act, has acquired a vested right to the damages awarded by the commissioners, and that that right became vested in him when the award was made and recorded. The statute requires "that the commissioners shall determine the damages which the owner of the land may have sustained, or shall be likely to sustain, by *the occupation of the same for the purposes aforesaid.*" The actual taking and occupation of the same for such purposes is the foundation upon which the binding character of that award is made to rest. It is those circumstances which the commissioners are to take into consideration in ascertaining the amount of damages. If, therefore, the land has never been taken by the company in a manner in which they can legally occupy the same, no damages have arisen, or can arise, from that cause. When the corporation obtains a vested right to the land, or to the easement, the landholder has a vested right to the damages; that specific act which vests the right in them, gives also a vested right to the owner of the land. These respective rights are correlative, and have a reciprocal relation; the existence of one depends upon the existence of the other. If the corporation have no vested right to the land, the owner of the land has no vested right to the price which was to be paid for it. This is the very ground upon which the cases were sustained, to which we were referred in the 2 Greenl. 179; 4 N. Hamp. 517; and 1 Wend. 53. Two of these cases were in assumpsit, and the other in debt for the recovery of a sum awarded for land taken for similar purposes. The land-owner was allowed to recover his damages, and was treated as having a vested right to them; as a vested right to the easement in the land had been acquired, for which those damages had been given as a compensation. That is also the doctrine of the case in the 10 Howard, 395, for on that ground alone was sustained the constitutionality of the act of

Maryland, in causing to be vacated the *first appraised*, and ordering a new inquisition to be taken. As there had been no payment or tender of the damages assessed, there was no vested right to the land, and for that reason the act was held constitutional in vacating the first inquisition. On the same ground, and for that reason specifically assigned, the court in the case of *Harrington v. Berkshire*, 22 Pick. 267, granted a mandamus to enforce the payment of damages awarded to the landholder. The road had been laid, the title to the easement *under their statute had vested*, and for that reason, the party had a vested right to the damages awarded. We know of no case, neither have we been referred to any, in which such damages have been recovered, or in which the owner of the land has been considered as having a vested right to the same, when the corporation had acquired no right to the land, or to an easement growing out of it. There is no propriety or consistency in saying, that the plaintiff shall recover this compensation for land which has never been taken or purchased from him; that this company shall pay for a right or an easement, which they never had, and which they never could legally enjoy. If the line of this road had been so varied as to run over another portion of the plaintiff's land, it would hardly be contended that he would be entitled to a double compensation; yet such would be the result if this action can be sustained.

The cases in England have no definite bearing upon this subject, nor are they in conflict with the construction we have given to the provisions of this charter. In that country, generally, the railroad is located, and its courses definitely defined, when the application is made to parliament for a charter. When a charter is granted, it is based upon that location, and authority is granted to take that specific land for that purpose. The owner of the land is required to specify the sum he demands for it, and if not assented to, inquisition is to be made to determine the value of the land. *Burkinshaw v. Birmingham & Oxford Railway Co.*, 5 Eng. Law & Eq. 492. Under those charters it has been held, that if no inquisition is made, the company are bound to pay the sum specified, and not only has payment been enforced by mandamus, but the company have, by the same process, been compelled to carry into effect all the powers delegated to them by their charter. *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & Keene, 162, 163; *Regina v. The Eastern Counties R. Co.*, 10 Adol. & Ellis, 531; *Regina v. The York North Midland R. Co.* 16 Eng. Law & Eq.

299. That doctrine, however, has since been overruled in the Exchequer Chamber, to which the last cited case was carried on a writ of error. *York & N. Midland Railway Co. v. Regina*, 18 Eng. Law & Eq. 206, 207, 208. Those charters are now treated as conferring conditional powers to take the land on making compensation for it. The observations of *Jervis*, Ch. J., in the last case, are very appropriate and applicable to the rights of the parties under this charter: "The company may take land; if they do they must make full compensation. The words of the statute are permissive, and only impose the duty of making full compensation to each landholder, as the option of taking the land of each is exercised." This case as well as the case of *Burkinshaw v. The Birmingham & Oxford R. Co.*, 4 Eng. Law & Eq. 489, establishes the correlative and reciprocal relation existing between the right of the company to the land, and the right of the owner of the land to the damages awarded. If the land has been taken in such a manner as to vest in the company a right to the use and occupancy of it, compensation is to be made; but no right to such compensation can exist where the land has not been taken.

The authorities upon the questions involved in this case, we think, are more than ordinarily clear and decisive, and fully establish the principle that the plaintiff has no claim to these damages, as the land has never been taken or occupied by the corporation for the purposes mentioned in their charter; and that the payment of the money as awarded by the commissioners is necessary, and is to be treated as a condition precedent to the right of the company to the land, or to any easement growing out of it.

In *Neal v. Pittsburgh & Connellsville Railway Company*, 31 Penn. St. 19, it is held that where a railway company had located their road through a man's land and had the damages assessed by viewers and confirmed by the court, the owner of the land was entitled to execution for the amount as upon a judgment in his favor, although the company had not taken possession, and had instituted proceedings to ascertain the advantages of another route with a view to change the location.

The court say: "Though railroad companies may make experimental surveys at pleasure before finally locating their road, yet certainly it has never been granted to them to have experimental suits at law as a means of chaffering with the land-owners for the cheapest route." The foregoing extract is certainly good sense, and one would suppose ought to be good law; but the decisions do not seem to fully bear it out.

TITLE ACQUIRED BY COMPANY AND RIGHT TO EXCLUDE FORMER OWNER FROM ALL USE OR POSSESSION.

Hill v. Western Vermont Railway Company, 32 *Vermont Reports*, 68.

THE Western Vermont Railway Company, before their road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B. as depot grounds, and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railroad purposes, and would not become so prospectively: it was

Held, that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations.

That under their charter the company could not compulsorily acquire any more land, or any greater estate therein, for the purposes of a road-bed or stations than was really requisite for such uses.

That the estate so requisite was not one in fee simple, but merely an easement, and was therefore not subject to be levied upon by the creditors of the company.

That when taken for such purposes the rule was the same whether the land was taken compulsorily by condemnation and the award of commissioners, as to its extent and price, or under the agreement of the parties as to one or both of these particulars.

That under their charter the directors had power to lay out their road and stations as they saw fit, and that so long as they acted in good faith, and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive.

OPINION.

REDFIELD, C. J. This is an action of ejectment to recover possession of certain lands which the defendants purchased of one Burton for depot purposes, about one of their stations, and which the referee in this case has found were not necessary for the present or prospective use of the company for that purpose, the excess,

according to the opinion of the referee, being some acres. The plaintiff, being a creditor of the company, levied upon this excess, together with a considerable number of acres more which the referee finds are necessary for the use of the company, for the purposes for which they were procured. The appraisal and levy was upon the entire portion of land, both that which was and that which was not necessary for the uses of the company.

The company, before they surveyed their road, contracted with Burton for the conveyance of "such lands" owned by him "as shall be required" for the company's road, "on reasonable request." The land was subsequently designated by metes and bounds, and the money paid for the piece, but the land has never been conveyed to the company.

The first question arising in the case is as to the extent of estate which Burton is bound to convey to the company. The plaintiff claims that this is an estate in fee simple, as the contract binds him to convey such lands "owned by him" as shall be required by the company. This is, no doubt, the fair and natural construction of such a contract between ordinary parties. If the land is to be conveyed and is defined as land "owned" by the obligor, nothing less could be fairly intended, in ordinary cases, than an estate in fee simple. But here the land is purchased and to be conveyed to the company for their use, "such as shall be required by them." We do not understand by this, all the lands they might ask for, but such as their powers and functions and business required. We do not think the scope of the bond could fairly be made to extend beyond this. It would be very unreasonable, as it seems to us, to construe this bond as extending beyond this, and including, at the election of the defendants, all the land owned by Burton, and lying near the line of the railway.

So too it seems to us, that as Burton, by the fair construction of the bond, was only bound to convey such lands as were reasonably required for the legitimate uses of the company, so he was only bound to convey such estate therein as they required for those uses. If the extent of territory could fairly be defined and limited by the general objects and purposes of the contract, which is a familiar rule of construing all contracts, and as applied to a case of this character, a most significant and unquestionable one, as we think, the same rule also applies with equal force to the estate to be conveyed. A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a

particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed.

We think, therefore, that the bond, as originally given, would not have bound the party to convey more land than the company fairly required for their legitimate uses under their charter, or any greater estate in the land than such uses justly required. That is just what the company were empowered to take compulsorily. And their charter, as we think, was not intended to give them power to acquire any more land or any greater estate in such land, for the purposes of a road-bed or stations, than was really requisite for such uses under their charter. We do not intend to say that if they purchased and took the conveyance of the fee of land for these purposes, they could not hold it or convey it, although some courts have so held. Nor do we intend to intimate any decided opinion that they may do this. The general provisions of the charter of this company are much like other charters in this and the other states, and similar to the general railway act, and seem to have reference to acquiring the right to such an estate in the necessary lands as is requisite for the road-bed and other incidental use and accommodation of the company, in their prescribed and necessary business.

The company may purchase lands for wood and timber, for their ordinary uses, and may, no doubt, purchase, take, and hold, and also convey, the fee simple of such lands. We are not inclined here to question the right of this company to take the fee of lands by way of gift, or in payment of debts due them, either by voluntary conveyance or by levy, *in invitum*. It is not important to discuss these propositions here. They may all be conceded.

But they do not affect the question, what extent of land and what estate the company were expected to take by purchase or gift, or by condemnation, for their road-bed and depots. We think it very obvious, from this charter and many others we have examined, where the quantity of estate is not defined, that it should be construed as we have already intimated in regard to the bond of Burton, according to the object and purport of the grant, and the necessities or wants of the corporation thereby created. It seems to us to be leaving all just limits of construction to go beyond this. It is certain, as already intimated, that this is the ordinary rule of construing contracts. And statutes are generally construed much after the same rules as contracts, and especially statutes of this character, which are much in the nature of contracts between the

sovereignty and the shareholders, or, strictly speaking, between the sovereignty and the corporation. In other words, the charter is a grant of certain franchises and immunities, upon certain terms and conditions, and with certain specified or implied limitations. These conditions and limitations are the consideration and the counterpart, so to speak, of the grant. By accepting the grant the corporation bind themselves to perform the obligations and duties reasonably and fairly implied by the conditions of the grant. So that the charter should receive the same construction as any other contract of a similar character.

One of the important franchises of railway corporations, and the one which distinguishes corporations of this public character from ordinary business corporations, on account of its sovereign or prerogative character, is that right which in the sovereign is called eminent domain, which is the power to invade private property and appropriate it to its own purposes. The right to exercise this function is made dependent upon rendering an equivalent in money, and the implied compact not to acquire more land than they need. And the charters, or general laws, in most of the American states, allow the details of the appropriation of lands to the use of railways to be arranged either by the judgment of certain public functionaries designated for that purpose, or by the consent of the land-owner. But in the latter mode even, the proceeding is, in some sense, compulsory. The land-owner does not stand precisely in the position of an ordinary proprietor in the market. He has no election whether he will part with his land or not, but only whether he will fix the terms by negotiation or by the appraisal of the commissioners or the court. In either mode of appropriating land for the purposes of the company, where they have by their charter the power to take it compulsorily, there is this implied limitation upon the power that the company will take only so much land or estate therein as is necessary for their public purposes. It does not seem to us to make much difference in regard to either the quantity or the estate, whether the price is fixed by the commissioners or by the parties. For under this charter it is the act of the directors which designates the extent of land to be taken, and thus far the taking is compulsory and strictly under the powers granted by the charter.

In regard to the mode of appropriating land to the purposes of the road-bed and depots of a railway company, it is obvious that it should be done in some way which shall be judicial and final, for

the time at least. This is necessary both for the company and the land-owner, and when done in the mode pointed out in the charter, it must be final, or should be so, unless some power is reserved, either expressly or impliedly, to change the location of the road, as in the defendants' charter seems to be given, or to enlarge its facilities with the advancement of business, which this charter does not give in terms. This is not ordinarily reserved to railways. When once located the location is commonly regarded as final. They must take such lands as will be likely to accommodate their business, both present and prospective. In doing this it would not be wonderful if they should take more, sometimes, than every one regarded as necessary. The same may be true of their road-bed. A jury or referee might well consider, in many cases no doubt, that at many points four or five rods, or even three rods in width, was just as beneficial for all the purposes of the road as six rods, which some of the early chartered roads in this state are allowed to take and do take. The same may be often true of the land taken for depot accommodations.

But if the road-bed or land for stations is taken in the mode prescribed in the charter and general law of the state, whether by the judgment of the commissioners, as to its extent as well as the land damages, or by the act of the directors through their surveyors and engineers, as to its extent, and the appraisal of the commissioners as to its value, or by the directors as to its extent, or the agreement of parties as to the price, as in this case, when once taken in the mode prescribed in the charter, as this land was taken, it is regarded as well settled that the land so taken is not subject to the levy of an execution. This is put upon the ground, and justly we think, that the estate, being a mere easement for a particular use, is not of the quality and character which by the statute is made subject to a levy. This is not an estate in fee, or for life, or years, or indefinitely, or an equity of redemption, which are the estates defined in the statute. But it is an easement, a right to use the land in a particular mode for a particular purpose, and which cannot be transferred to an ordinary person having no right to use it in that mode or for that purpose, since the estate would cease and the land revert, the moment it was put to any other use than the one designated in the charter or statute, by or under which the appropriation was made.

So that whether the company take more or less, if taken for

these purposes and no other, and only an easement is acquired by the company, it is not an estate which can be transferred by a levy to the creditors of the company, or by any conveyance, in parcels, probably. But of this we need not speak. It is certain the statute has not provided for levying upon any such estate. And this we think is the only estate for which the company contracted with Burton, or which he is bound to convey to them.

And as to the quantity of land taken, if the directors of the company have power to lay out their own road in any place they choose, and to the extent of five rods in width, and to take such lands for depot purposes as they deem expedient, and they have acted in good faith, we do not see very well how their proceedings can be brought in question by any one. It may have been the folly of the legislature to grant any such power to the directors of the company, but if they have done so, and this power is altogether unlimited, unless they act rashly or in bad faith, it is not very obvious how they are to be controlled in the matter. No doubt if they act recklessly or extravagantly, so as to indicate either utter incompetence, or corruption, or undue influence, or bad faith, a court of equity, at the suit of the land-owner or the stockholders, would set the matter right. But this would thus be done in such a mode as to settle it definitely and not to leave it subject to the confusion consequent upon subjecting it to the action of independent tribunals, in regard to portions of the land taken for the same purpose whose decisions would almost inevitably produce more or less confusion and uncertainty. But so long as the land is appropriated to the road-bed and depot purposes in the very mode prescribed in the statute, we do not very well comprehend how it can be appropriated in parcels to the payment of the debts of the company, by means of levies, even if the fee had been conveyed to the company.

In cases where the company purchase lands, not intending or supposing they are to be used or are requisite for depot purposes, as is sometimes the case, because they can obtain them in that mode upon more reasonable terms, and where, as in such cases is more usual, the conveyances profess to convey the fee simple, and no separation has been made between such of the lands as are required for depot purposes and such as were never supposed to be requisite for any such purpose, it is not necessary to give any intimation what might be the rights of creditors or what

course should be pursued to secure such rights, such as they are, if any.

As the company had no such estate in these lands, or any such extent of territory as could be subjected to the levy of executions, at the suit of their creditors, treating their rights the same as if Burton had already executed all the conveyance which a court of equity would compel him to execute, it is not necessary to consider the other questions in the case.

Judgment affirmed.

In *Blake v. Rich*, 34 N. H. 285, it is held that a railway takes but a mere easement in lands. *Fowler, J.*, says, "Does the railroad corporation acquire any such higher, more extensive and more exclusive right?" (than the public and the public authorities gain by the laying out of such lands as a public highway.) "A careful examination of the various statutes authorizing the taking of lands for railroads, and a comparison of the language with that of those statutes providing for the taking of land for highways, satisfies us it does not, and we see nothing in the use to which the land is appropriated in the one case, and the other requiring the same phraseology to be differently construed in the two cases. By the theory as well as the letter of the law, the taking in both cases is for the public use, and that use is no more inconsistent with the continuance of the fee in the original owner in the case of a railroad than in that of a highway." But in *Railway Company v. Davis*, 2 Dev. & Bat. 467, *Ruffin C. J.* says, "The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect at least to such highways as existed at the time the principle was adopted, and to which it had reference. But if the use requisite to the public be such an one as requires the whole thing, the same principle which gives to the public the right to any use gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge in cases in which it *may* be for the public interest to have the use of private property, whether in fact the public good requires the property, and to what extent. From the great cost of this road (a railway), from its nature and supposed utility, it seems to be contemplated to preserve it perpetually, or for a great and indefinite period. All persons are excluded from going on it, unless in the vehicles provided by the public or its agents; and to enforce that provision and adequately protect the erections from injuries, it may be requisite to divest the property out of individuals." See also *Giesy v. Cincinnati, Wilm. & Z. Railway*, 4 Ohio, N. S. 308.

In *Nicoll v. The New York & Erie Railway*, 12 N. Y. 128, it was objected that because by the act of incorporation there was given to the defendant only a term of existence of fifty years, therefore the grant of land in question, which was a piece six rods in width across the grantor's farm for the site of the defendants' railway, should be deemed to have conveyed an estate for years, not in fee. But the court said that the unsoundness of that position was easily shown; that it was never yet held that a grant in fee in express terms could be restricted by the fact

that the grantee had but a limited term of existence. And "it is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized."

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. (5 Denio, 389; 2 Preston on Estates, 50.) Kent says, "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (2 Kent, 282; 5 Denio, 389; 1 Comst. 509.) Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence."

But the right of a railway company to the exclusive possession of the land taken for the purposes of their road, differs very essentially from that of the public in the land taken for a common highway. The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, by the former owners in any mode and for any purpose. *Jackson v. R. & B. R. R.* 25 Vt. 150; *Conn. & Pass. Rivers R. R. v. Holton*, 32 Vt. 47.

Thomas J. says, in *Hazen v. Boston & M. R. R.*, 2 Gray, 580, "The right acquired by the corporation" (a railway company) "though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature, and practically exclusive."

CORPORATE FRANCHISES MAY BE TAKEN FOR PUBLIC USE, SAME AS ANY OTHER PROPERTY.

West River Bridge Company v. Dix, 6 *Howard's (U. S.) Reports*, 507.

A bridge erected and owned by a private company, which was incorporated with the exclusive privilege of erecting such a bridge, and taking tolls for passing the same, the said bridge being held and used for the purposes for which the company was created, may be taken and laid out as a public highway under a general law of the state, compensation being made therefor the same as to an individual from whom land is taken.

OPINIONS.

MR. JUSTICE DANIEL. The *West River Bridge Company*, plaintiffs,
v. Joseph Dix and the towns of Brattleboro' and Dummerston, de-

fendants, upon a writ of error to the Supreme Court of Judicature, of the State of Vermont, sitting in certain proceedings as a court of law; and the same plaintiffs *v.* the Towns of Brattleboro' and Dummerston, and Joseph Dix, Asa Boyden, and Phineas Underwood, upon a writ of error to the Supreme Court of Judicature, and to the Chancellor of the first circuit of the State of Vermont.

These two causes have been treated in the argument as one, and such they essentially are. Though prosecuted in different forms and different forums below, they are merely various modes of endeavoring to attain the same end, and a decision in either of the only question they raise for the cognizance of this court disposes equally of that question in the other.

They are brought before us under the twenty-fifth section¹ of the judiciary act, in order to test the conformity with the Constitution of the United States of certain statutes of Vermont; laws that have been sustained by the Supreme Court of Vermont, but which it is alleged are repugnant to the tenth section of the first article of the constitution, prohibiting the passage of state laws impairing the obligation of contracts.

It appears from the records of these causes, that, in the year 1795, the plaintiffs in error were, by act of the legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking toll for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and enjoyed the franchise granted them by law, until the institution of the proceeding now under review.

By the general law of Vermont, relating to roads, passed 19th November, 1839, *vide* Revised Laws of Vermont, p. 553, the county courts are authorized, upon petition, to appoint commissioners to lay out highways within their respective counties, and to assess the damages which may accrue to landholders by the opening of roads; and these courts, upon the reports of the commissioners so appointed, are empowered to establish roads within the bounds of their local jurisdiction. A similar power is vested in the supreme court, to lay out and establish highways extending through several counties.

1 Stats. at Large, 85.

By an act of the legislature of Vermont, passed November 19, 1839, it is declared that "whenever there shall be occasion for any new highway in any town or towns of this state, the supreme and county courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons whose estates, easement, franchise, or rights shall be taken, as are now granted and provided in other cases." Under the authority of these statutes, and in the modes therein prescribed, a proceeding was instituted in the county court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plaintiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property, and for the consequent extinguishment of their franchise. The judgment of the county court, having been carried by *certiorari* before the supreme court of the state, was by the latter tribunal affirmed.

Pending the proceedings at law upon the petition of Dix and others, a bill was presented by the plaintiffs in error to the Chancellor of the first judicial circuit of the State of Vermont, praying an injunction to those proceedings so far as they related to the plaintiffs or to the real estate, easement, or franchise belonging to them. This bill, having been demurred to, was dismissed by the chancellor, whose decree was affirmed on appeal to the supreme court, and a writ of error to the last decision brings up the case on the second record.

In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the State of Vermont, which the latter, under the inhibition in the 10th section of the first article of the constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both

sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the state legislation or to the constitution.

Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted, not only in the highest acts of sovereignty, and in the external relations of governments: they reach and comprehend, likewise, the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The Constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts, that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only in the original nature of tenure that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis

the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the first article of the constitution, it remains with the states to the full extent in which it inheres in every sovereign government to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom, the mode, the policy, the hardship of any exertion of this power, are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to

reside in the state government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power in some mode or other from the very foundation of civil government have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed the power was never, or at any rate rarely, questioned until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons resting upon the ordinary foundations of private right there would seem to be room neither for doubt nor difficulty. A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons in the use or enjoyment of their private property to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating in his second volume, c. 3, p. 26, of the "Rights of Things." It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyments. *Vide* Bl. Comm. vol. 3, c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road,

to keep a ferry, and to collect tolls upon them granted by the authority of the state, we regard as occupying the same position with respect to the paramount power and duty of the state to promote and protect the public good as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution and no violation of a contract. The power of a state in the exercise of eminent domain to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term Reports, 794, and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

The several state decisions cited in the argument, from 3 Paige's Chancery Reports, p. 45; from 23 Pickering, p. 361; from 17 Connecticut Reports, p. 454; from 8 New Hampshire Reports, p. 398; from 10 New Hampshire Reports, p. 371, and 11 New Hampshire Reports, p. 20, are accordant with the decision above mentioned, from 4 Durnford & East, and entirely supported by it. One of these state decisions, namely, the case of the Enfield Toll Bridge Company *v.* The Hartford & New Haven Railroad Company, 17 Connecticut Reports, 454, places the principle asserted in an attitude so striking, as seems to render that case worthy of a separate notice. The legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted, in a charter subsequently granted by them to the Hartford and Springfield Railroad Company, a provision in these words: "That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company." This provision, comprehensive as its language may seem to be, was decided by the supreme court of the state as not embracing any exemption of the bridge company from the legislative power of eminent domain, with respect to its franchise, but to declare this, and this only,—that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield

Bridge Company should remain as inviolate as the property of other citizens of the state. These decisions sustain clearly the following positions, comprised in this summary given by Chancellor Walworth, 3 Paige's Reports, p. 73, where he says, that, " notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity ; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency of the state is concerned." In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognize the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power, — the only question properly presented on these records, — we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise ; nor do we inquire into the conformity between the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes ; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the state for the exercise of her legitimate authority, and as being without the province assigned to this court by the judiciary act.

Upon the whole, we consider the authority claimed for the State of Vermont, and the exertion of that authority which has occurred under the provisions of the statutes above mentioned, by the extinguishment of the franchise previously granted the plaintiffs, as set forth upon the records before us, as presenting no instance of the impairing of a contract, within the meaning of the 10th section of the 1st article of the constitution, and consequently no case which is proper for the interposition of this court. The decisions of the Supreme Court of Vermont are, therefore, affirmed.

MR. JUSTICE McLEAN. As this is a constitutional question of considerable practical importance, I will state succinctly my general views on the subject.

The West River Bridge, under the statutes of Vermont, was ap-

propriated to public purposes, and it is alleged that the charter under which the bridge was built and possessed by such appropriation was impaired. Our inquiry is limited to this point. For whatever injury the proceeding may have done to the interests of the corporation, unless its contract with the state was impaired, we have no jurisdiction of the case.

The power in a state to take private property for public use is undoubted. It is an incident to sovereignty, and its exercise is often essential to advance the public interests. This act is one under the regulations of the state. If those regulations have not been strictly observed, that is not a matter of inquiry for this court. The local tribunals have the exclusive power in such cases.

This act by a state has never been held to impair the obligations of a contract by which the property appropriated was held. The power acts upon the property, and not on the contract. A state cannot annul or modify a grant of land fairly made. But it may take the land for public use. This is done by making compensation for the property taken, as provided by law. But if it be an appropriation of property to public use, it cannot be held to impair the obligations of the contract.

It is insisted that this was a pretended exercise of the power of the eminent domain, with the view of destroying the force and obligation of the plaintiffs' charter.

This whole proceeding was under a standing law of the state, and it was sanctioned, on an appeal, by the supreme court of the state. A procedure thus authorized by law and sanctioned, cannot be lightly regarded. It has all the solemnities of a sovereign act.

But it is said that the franchise of the plaintiff cannot be denominated property; that "it included the grant of no property, real or personal; that it lay in grant and not in livery." If the action of the state had been upon the franchise only, this objection would be unanswerable. The state cannot modify or repeal a charter for a bridge, a turnpike-road, or a bank, or any other private charter, unless the power to do so has been reserved in the original grant. But no one doubts the power of the state to take a banking-house for public use, or any other real or personal property owned by the bank. In this respect, a corporation holds property subject to the eminent domain, the same as citizens. The great object of an act of

incorporation is to enable a body of men to exercise the faculties of an individual. Peculiar privileges are sometimes vested in the body politic, with the view of advancing the convenience and interests of the public.

The franchise, no more than a grant for land, can be annulled by the state. These muniments of right are alike protected. But the property held under both is held subject to a public necessity, to be determined by the state. In either case, the property being taken, renders valueless the evidence of right. But this does not in the sense of the constitution impair the contracts. The bridge and the ground connected with it, together with the right of exacting toll, are the elements which constitute the value of the bridge. The situation, and productiveness of the soil, constitute the value of land. In both cases an estimate is made of the value, under prescribed forms, and it is paid when the property is taken for public use. And in these cases the evidences of right are incidents to the property. No state could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken and the business of the bank continued for public purposes. Nor could this bridge have been taken by the state, and kept by it as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bona fide* by a state, but the property, not its product, must be applied to public use.

It is argued that if the state may take this bridge, it may transfer it to other individuals under the same or different charter. This the state cannot do. It would be, in effect, taking the property from A. to carry it to B. The public purpose for which the power is exerted, must be real and not pretended. If, in the course of time, the property, by a change of circumstances, should no longer be required for public use, it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway, should be abandoned, it would revert to the original proprietor and owner of the fee.

It is objected that this bridge, being owned by a corporation, and used by the public, does not come within the designation of

private property All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private. The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. But it was a toll-bridge; by the act it is made free. The use, therefore, is not the same. The tax assessed on the citizens of the town, to keep up and pay for the bridge, may be impolitic or unjust; but that is not a matter for the consideration of this court.

It is supposed if this power is sustained by the State of Vermont it will be in the power of a state to seize the evidences of its indebtedness in the hands of its citizens or within its jurisdiction, have their value assessed, and by paying the amount extinguish them. Such a case bears no analogy to the one before us. The contract only is acted upon in the case supposed. The obligation to pay the money by the state is materially impaired, which brings the case within the constitution. But the appropriation of property affects the contract or title by which it is held only incidentally. This, it is said, is an extremely technical distinction, and is not sustainable, as it enables a state to do indirectly what the constitution prohibits. However nice the distinction may seem to be, when examined, it will be found substantial.

The power of appropriation by a state has never been held by any judicial tribunal as impairing the obligation of a contract in the sense of the constitution. And this power has been frequently exercised by all the states, since the adoption of the constitution. In the 5th article of the amendments to the constitution, it is declared: "Nor shall private property be taken for public use, without just compensation." This refers to the action of the federal government; but a similar provision is contained in all the state constitutions. Now the constitution does not prohibit a state from impairing the obligation of a contract, unless compensation be made; but the inhibition is absolute. So that if such an act come within the prohibition, the act is unconstitutional. But this power has been exercised by the state since the foundation of the government, and no one has supposed that it was prohibited by that clause in the constitution which inhibits a state "from impairing the obligations of a contract." The only reasonable result, therefore, to which we can come is, that the power in the state is an independent power, and does not come within the class of cases prohibited by the constitution.

This view gives effect to the constitution in imposing a salutary restraint upon legislation affecting contracts, but leaves the states free in the exercise of the eminent domain, which belongs to their sovereignties, is essential for the advancement of internal improvements, and acts only upon property within their respective jurisdictions.

The powers do not belong to the same class. That which acts upon contracts and impairs their obligation, only is prohibited.

WOODBURY, J. In the decisions of this court on constitutional questions, it has happened frequently, that, though its members were united in the judgment, great differences existed among them in the reasons for it, or in the limitations on some of the principles involved. Hence, it has been customary in such cases to express their views separately. I conform to that usage in this case the more readily, as it is one of the first impressions before this tribunal, very important in its consequences, as a great landmark for the states as well as the general government, and, from shades of difference and even conflicts in opinion, will be open to some misconstruction.

I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a state is derived from, or protected by, its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Vattel, B. 1, c. 20, § 244; 2 Kent, Com. 270; 37 American Jurist, 121; 1 Blackstone, Com. 139; 3 Wils. 303; 3 Story on Const. 661; 3 Dallas, 95. Some ground this public right on sovereignty. 2 Kent, Com. 339; Grotius, B. 1, c. 1, § 6. Some, on necessity. 2 Johns. Ch. 162; 11 Wend. 51; 14 Wend. 51; 1 Rice, 383; Vanhorne's Lessee v. Dorrance, 2 Dal. 310; Dyer v. Tuscaloosa Bridge, 2 Porter, 303; Harding v. Goodlett, 3 Yerger, 53. Some, on implied compact. Raleigh & Gaston Railroad Co. v. Davis, 2 Dev. & Bat. 456; 2 Bay, 36, in S. Car.; 3 Yerger, 53. Where a charter is granted after laws exist to condemn property when needed for public purposes, others might well rest such a right on the hypothesis, that such laws are virtually a part and condition of the grant itself, as much as if inscribed in it, *totidem verbis*. Towne v. Smith, 1 Woodbury & Minot, 134; 2 How. 608, 617; 1 *ibid.* 311; 3 Story on Const. §§ 1377, 1378, *quære*.

But, however derived, this eminent domain exists in all governments, and is distinguished from the public domain, as that consists of public lands, buildings, &c., owned in trust exclusively and entirely by the government, 3 Kent, Com. 339; *Memphis v. Overton*, 3 Yerger, 389, while this consists only in the right to use the property of others, when needed, for certain public purposes. Without now going further into the reasons or extent of it, and under whatever name it is most appropriately described, I concur in the views of the court, that it still remains in each state of the Union in a case like the present, having never been granted to the general government so far as respects the public highways of a state, and that it extends to the taking for public use for a road any property in the state, suitable and necessary for it. *Tuckahoe Canal case*, 11 Leigh, 75; 11 Pet. 560; 20 Johns. 724; 3 Paige, Ch. 45; 7 Pick. 459. But whether it could be taken without compensation, where no provision exists like that in the 5th amendment of the Constitution of the United States, or that in the Vermont constitution, somewhat similar, is a more difficult question, and on which some have doubted. 4 D. & E. 794; 1 Rice, 383; 3 Leigh, 337. I do not mean to express any opinion on this, as it is not called for by the facts of this case. But compensation from the public in such cases prevails generally in modern times, and certainly seems to equalize better the burden. 2 Dal. 310; *Pisc. Bridge v. N. Hamp. Bridge*, 7 N. Hamp. 63; 4 D. & E. 794; 1 Nott & McCord, 387; *Stokes et al. v. Upper Appomatox Co.*, 3 Leigh, 337; 11 id. 76; *Hartford Bridge*, 17 Conn. 91; *Vattel*, B. 1, c. 20, § 244; 3 Paige, Ch. 45; 2 Dev. & Bat. 451; 2 Kent, Com. 339, note; *Lex. & Oh. Railroad case*, 8 Dana, 289.

Nor shall I stop to discuss whether it is on this principle of the eminent domain alone, that private property has always been taken for highways in England, on making compensation, so as to be a precedent for us. This was done there formerly, not as here, but by a writ *ad quod damnum*, and it was for ages issued before the grant of any new franchise by the king, whether a road, ferry, or market; and the inquiry related to the damage by it, whether to the public or individuals. *Fitz. N. B.* 221; 3 Bac. Abr., Highways, A.

Nor were alterations in roads, or even the widening or discontinuing of them, allowed without it. *Thomas v. Sorrel*, Vaughan, 330, 348, 349; *Cooke*, c. 267; 6 Barn. & Ald. 566.

But in modern times parliament, by various laws, have authorized all these, after inquiry and compensation awarded by certain magistrates. 1 Burr. 263; Camp. 648; Cro. Car. 266, 267; 5 Taunt. 634; Domat, B. 1, t. 8, § 2; 7 Adol. & Ellis, 124.

And thus, notwithstanding the theoretical omnipotence of parliament, private rights and contracts have been in these particulars, about compensation and necessity for public use, as much respected in England as here.

So as to railroad companies, as well as turnpikes, under public trustees, and as to common highways; the former are often authorized there to erect bridges, and carry their roads over turnpikes and other highways; but it is on certain conditions, keeping them passable in that place or near, and on making compensation. *Kemp v. L. and B. Railway Co.*, 1 Railway Cases, 505, and *Attorney-General v. The L. & S. Railroad*, 1 id. 302, 224; 2 id. 711; 1 Gale & D. 324; 2 id. 1; 4 Jurist, 966; 5 id. 652; 9 Dowl. P. C. 563; 7 Adol. & Ellis, 124; 3 Maule & Selw. 526; 11 Leigh, 42.

But I freely confess, that no case has been found there by me exactly in point for this, such as the taking of the road or bridge of one corporation for another, or of taking for the public a franchise of individuals connected with them. Though, at the same time, I have discovered no prohibition of it, either on principle or precedent, if making compensation and following the mode prescribed by statute.

The peculiarity in the present case consists in the facts that a part of the property taken belonged to a corporation of the state, and not to an individual, and a part was the franchise itself of the act of incorporation.

I concur in the views, that a corporation created to build a bridge like that of the plaintiffs in error is itself, in one sense, a franchise. 2 Bl. Com. 37; *Bank of Augusta v. Earle*, 13 Pet. 596; 4 Wheat. 657; 7 Pick. 394; 11 Pet. 474, 454, 472, 490, 661, 645; 11 Leigh, 76; 3 Kent, Com. 459. And, in another sense, that it possesses franchises incident to its existence and objects, such as powers to erect the bridge and to take tolls. See same cases.

I concur in the views, also, that such a franchise as the incorporation is a species of property. 7 N. H. 66; *Tuckahoe Canal Co. v. Tuckahoe and James R. Railroad Co.* 11 Leigh. 76. It is a legal estate vested in the corporation. 4 Wheat. 700; 11 Pet. 560. But it is often property distinct and independent of the other

property in land, timber, goods, or choses in action, which a corporation, like a body not artificial, may own. 3 Bland, 449; 11 Leigh, 76.

It is also property subject to be sold, sometimes even on execution, *Semb.* 4 Mass. 495; 11 Pet. 434, and may be devised or inherited. 17 Conn. 60. And while I accede to the principle urged by the counsel for the bridge, that the act of incorporation in this case was a contract, or in the nature of one between the state and its members, 1 Mylne & Craig, 162; 4 Pet. 514, 560; *Lee v. Milner*, 2 You. & Coll. 618; *King v. Pasmore*, 3 D. & E. 246; *Woodward v. Dartmouth College*, 4 Wheat. 628; 7 Cranch, 164; *Terrett v. Taylor*, 9 Cranch, 43, 52; 9 Wend. 351; 11 Pet. 257; *Canal Co. v. Railroad*, 4 Gill & Johns. 146; 3 Kent, Com. 459; *Enfield Toll-Bridge case*, 17 Conn. 40; 1 Greenl. 79; 8 Wheat. 464; 10 Conn. 522; *Peck*. 269; 1 Ala. 23; 2 Stewart, 30, I concur in the views of the court, that this or other property of corporations may be taken for the purpose of a highway, under the right of eminent domain, and that the laws of Vermont authorizing it are not in that respect and to that extent violations of the obligation of any contract made by it with the corporation. *Bradshaw v. Rogers*, 20 Johns. 103, 742; *The Trust. of Belf. Ac. v. Salmond*, 2 Fairf. 113; *Enfield Bridge Case*, 17 Conn. 40, 45, 61; 3 Paige, Ch. 45; *Charles River Bridge v. Warren Bridge*, 7 Pick. 394, 399; s. c. 11 Pet. 474; 1 Bland, 449; *Bellona Co. case*, 3 Bland, 449.

Because there was no covenant or condition in the charter or contract, that the property owned by it should not be liable to be taken, like all other property in the state, for public uses in highways. 7 N. Hamp. 69; 4 Wheat. 196; *Jackson v. Lamphire*, 3 Pet. 289.

Because, without such covenant, all their property, as property, must be liable to proper public uses, either by necessity, or the sovereignty of the state over it, or by implied agreement.

And because, on a like principle, taxes may be imposed on such property, as well as all other property, though coming by grant from the state, and may be done without violating the obligation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled. 5 Barn. & Ald. 157; 2 Railway Cases, 17 arg. 23; 7 Cranch, 164; *New Jersey v. Wilson*, id.; *Providence Bank v. Billings*, 4 Pet. 514, *Shaw*, C.

J., in *Charles River Bridge v. Warren Bridge*; *Gordon v. Appeal Tax Court*, 3 How. 146; 12 Mass. 252; 4 Wheat. 699; 4 Gill & Johns. 132, 153; *Williams v. Pritchard*, 4 D. & E. 2. The grantees are presumed to know all these legal incidents or liabilities, and they being implied in the grant or contract, their happening is no violation of it. 8 Pet. 281, 287; 11 Pet. 641, 644; 3 Paige, 72.

Vattel says: "The property of certain things is given up to the individuals only with this reserve." B. 1, c. 20, § 244.

In England, anciently, when titles of land became granted with immunities from numerous ancient services, it was still considered that such lands were subject by implication, under a certain *trinoda necessitas*, to the expenses of repair of bridges as well as forts, and of repelling invasion. Tomlins, Dict., *Trinoda Necessitas*; 3 Bac. Abr., Highways, A.

Even the right to a private way is sometimes implied in a grant, from necessity. Cro. Jac. 189; 8 D. & E. 50; 4 Maule & Selw. 387; 1 Saund. 322, note.

It is laid down, also, by Justice Story, that "a grant of a franchise is not in point of principle distinguishable from a grant of any other property." *Dartmouth College v. Woodward*, 4 Wheat. 699, 701.

I concur, therefore, in the further views, that the corporation as a franchise, and all its powers as franchises, both being property, may for these and like reasons, in proper cases, be taken for public use for a highway. *Pierce v. Somersworth*, 10 N. Hamp. 370; 11 N. Hamp. 20; *Piscat. Bridge v. N. Hamp. Bridge*, 7 N. Hamp. 35, 66; 8 N. Hamp. 398, 143; 11 Pet. 645; Story, J., in *Warren Bridge v. Charles River Bridge*, 11 Pet. 582; 2 Kent, Com. 340, note; 2 Pet. 658; 5 Paige, Ch. 146; 1 Rice, 383; 2 Porter, 296; 7 Adol. & Ellis, 124; 3 Yerg. 41; 2 Fairf. 222; 23 Pick. 360; *J. Bonaparte v. C. Railroad*, Baldw. C. C. 205; *Tuckahoe Canal Co. v. The T. & J. River Railroad Co.*, 11 Leigh, 42; *Enfield Bridge Co. v. Hartford and New Haven Railroad*, 17 Conn. 40; *Arming-ton v. Barnet*, 15 Verm. 745, and 16 Verm. 446, this case; 3 Cow. 733, 754; 11 Wend. 590; *Lex and Oh. Railroad case*, 8 Dana, 289; 18 Wend. 14.

It must be confessed, that some surprise has been felt to find this doctrine so widely sustained, and in so many of the states, and yet no exact precedent existing in England.

But in relation to it here, I am constrained, in some respects, to

differ from others, and, as at present advised, agree to the last proposition, concerning the taking of the franchise itself of a corporation, only when the further exercise of the franchise as a corporation is inconsistent or incompatible with the highway to be laid out.

It is only under this limitation as to the franchise itself, that there seems to be any of the necessity to take it which, it will be seen in the positions heretofore and hereafter explained, should exist. Nor do I agree to it with that limitation, without another, —that it must be in cases where a clear intent is manifested in the laws, that one corporation and its uses shall yield to another, or another public use, under the supposed superiority of the latter and the necessity of the case. 4 Gill & Johns. 108, 150 ; *Barbour v. Andover*, 8 N. Hamp. 398.

Within these limitations, however, the acts of incorporation and all corporate franchises appear to me to possess no more immunity from reasonable public demands for roads and taxes, than the soil and freehold of individuals.

The land may come by grant or patent from the state, as well as the corporation, and both the grant and the corporation may be contracts. But they are contracts giving rights of property, held, and of course understood to be held, subject to those necessary burdens and services and easements to which all other property is liable. And it is neither inconsistent with the grant of them, nor a violation of the contract contained in them, to impose those burdens and easements, unless an express agreement has been made to the contrary by the state in the act of incorporation or grant, as is sometimes done in respect of taxation. But where the corporation, as a franchise, or its powers as franchises, can still be exercised usefully or profitably, and the highway be laid out as authorized, I see no reasons why these franchises should then be condemned or taken. The property owned by a banking or manufacturing corporation may, for instance, be condemned for highways, necessarily, where situated on a great line of travel ; but why should their franchises be, if their continued existence and use may be feasible and profitable, and one not inconsistent with the taking and employment of their other property for a public highway ?

In this instance, however, as a fact, the franchise was established and seems to be useful only in one locality. The continuance of it

elsewhere than at this spot would be of no benefit to individual members or the public. If the bridge itself and land of the corporation at that place were taken, it was better for the latter that the franchise should be taken with them, if enhancing the damages any, because, unlike a bank or manufacturing company, the corporation could not do business to advantage elsewhere, even within the limited four miles, as there was no road elsewhere within their grant. The law of Vermont, too, was clear, that the toll-bridge might be made to give way for a free highway. It is, therefore, only under the particular circumstances and nature of this case, that, in my apprehension, the taking of the franchise itself was not a violation of the contract. For, under different circumstances, if a franchise be taken and condemned for a highway, when not connected locally with other property wanted, when it can be exercised on ordinary principles elsewhere, when not in some respects incident to, or tied up with, the particular property and place needed, I am not now prepared to uphold it. I am even disposed to go further, and say, that if any property of any kind is not so situated as to be either in the direct path for a public highway, or be really needed to build it, the inclination of my mind is, that it cannot be taken against the consent of the owner. Because, though the right of eminent domain exists in some cases, it does not exist in all, nor as to all property, but probably as to such property only as, from its locality and fitness, is necessary to the public use. *Semb.* 4 Mylne & Craig, 116 ; *Webb v. Manch. and Leeds Railway Co.*, 1 *Railway Cases*, 576.

It may be such, not only for the bed of the road, but perhaps for materials in gravel, stone, and timber, to build it with. Yet even then it must be necessary and appropriate as incidents. 2 Dev. & Bat. 462 ; 13 East, 200.

And also, for aught I now see, circumstances must, from its locality and the public wants, raise an urgent necessity for it. "The public necessities" are spoken of usually as the fit occasion to exercise the power, if it be not derived from them in a great degree, and the reason of the case is confined to them. See cases before.

The ancient *trinoda necessitas* extended to nothing beyond such necessity.

Indeed, without further examination, I fear that even these limitations may not be found sufficient in some kinds of public high-

ways,— such as railroads, for instance. And I must hear more in support of this last position before acquiescing in their right to take, *in invitum*, all the materials necessary to build such roads,— as the timbers on which their rails are laid, or the iron for the rails themselves.

Nor do I agree that, in all cases of a public use, property, which is suitable or appropriate, can be condemned. The public use here is for a road, and the reasoning and cases are confined chiefly to bridges and roads, and the incidents to war. But the doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse. Where the public use is one general and pressing, like that often in war for sites of batteries, or for provisions, little doubt would exist as to the right. *Salus populi suprema est lex*. So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age,— such as its pressing demands for easier and social intercourse,— quicker political communication, or better internal trade,— and advancing with the public necessities from blazed trees to bridle-paths, and thence to wheel-roads, turnpikes, and railroads.

But when we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison ?

So a custom-house is a public use for the general government, and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence ; while as to a light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents, also, for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have been

advanced in this country. 3 Paige, 45. Again, many things belonging to bridges, turnpikes, and railroads, where public corporations for some purposes, are not, like the land on which they rest, local, and peculiar, and public, in the necessity to obtain them by the power of the eminent domain. Such seem to be cars, engines, &c., if not the timber for rails, and the rails themselves. *Gordon v. C. & J. Railway Co.*, 2 Railway Cases, 809.

Such things do not seem to come within the public exigency connected with the roads which justifies the application of the principle of the eminent domain. Nor does even the path for the road, the easement itself, if the use of it be not public, but merely for particular individuals, and merely in some degree beneficial to the public. On the contrary, the user must be for the people at large, — for travellers, — for all, — must also be compulsory by them, and not optional with the owners, — must be a right by the people, not a favor, — must be under public regulations as to tolls, or owned, or subject to be owned, by the state, in order to make the corporation and object public, for a purpose like this. 3 Kent, Comm. 270; *Railroad Co. v. Chappell*, 1 Rice, 383; *Memphis v. Overton*, 3 Yerger, 387; *King v. Russell*, 6 Barn. & Cress. 566; *King v. Ward*, 4 Adol. & Ellis, 384.

It is not enough that there is an act of incorporation for a bridge, or turnpike, or railroad, to make them public, so as to be able to take private property constitutionally, without the owner's consent; but their uses, and object, or interests, must be what has just been indicated, — must in their essence, and character, and liabilities, be public within the meaning of the term "public use." There may be a private bridge, as well as private road, or private railroad, and this with or without an act of incorporation.

In the present instance, however, the use was to be for the whole community, and not a corporation of any kind. The property was taken to make a free road for the people of the state to use, and was thus eminently for a public use, and where there had before been tolls imposed for private profit, and by a private corporation, so far as regards the interest in its tolls and property.

And the only ground on which that corporation, private in interest, was entitled in any view originally to condemn land or collect tolls, was, that the use of its bridge was public, — was open to all, and at rates of fare fixed by the legislature, and not by itself, and subjected to the revision and reduction of the public authorities.

It may be, and truly is, that individuals and the public are often extensively benefited by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights. 1 Rice, 388. And in point of law it seems very questionable as to the power to call such a corporation a public one, and arm it with authority to seize on private property without the consent of its owners.

I exclude, therefore, all conclusions as to my opinions here being otherwise than in conformity to these suggestions; though when, as in the present case, a free public use in a highway and bridge is substituted for a toll-bridge, and on a long or great and increasing line of public travel, and thus vests both a new benefit and use, and a more enlarged one, in the public, and not in any few stockholders, I have no doubt that these entitle that public for such a use to condemn private property, whether owned by an individual or a corporation. *Boston W. P. Co. v. B. & W. Railroad Corp.* 23 Pick. 360. And it is manifest that unless such a course can be pursued, the means of social and commercial intercourse might be petrified, and remain for ages, like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement. 2 Dev. & Bat. 456; 1 Rice, 395; 8 Dana, 309.

I exclude, also, any inference, that, in assenting to the doctrine, that an act of incorporation for a toll-bridge is a contract, giving private interests and rights as well as public ones, and thereby not allowing a state to take the private ones, or alter them, unless for some legitimate public use, or by consent, as laid down in 4 Wheat. 628, I can or do assent to the doctrine of some of the judges there in respect to public offices being such contracts as not to be changed or abolished by a state on public considerations, without incurring a violation of the contract.

I should be very reluctant to hold, till further advised, that public offices are not, like public towns, counties, &c., mere political establishments, to be abolished or changed for political considerations connected with the public welfare. 9 Cranch, 43. The salaries, duration, and existence of the offices themselves seem to be exclusively public matters, open to any modification which the representatives of the public may decide to be necessary, whenever no express restriction on the subject has been imposed

in the constitution or laws. *Quere.* Hoke v. Henderson, 4 Dev. 1.

This would seem the implied condition of the office or contract, as much as that it may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it. See, as to the last, *McCullock v. Maryland*, 4 Wheat. 316; *Weston v. The C. C. of Charleston*, 2 Pet. 449; *Dobbins v. Comm. of Erie City*, 16 Pet. 435.

Finally, I do not agree that even this franchise, as property, can be taken from this corporation without violating the contract with it, unless the measure was honest, *bona fide*, and really required for what it professed to be, beside being, as before remarked, proper, on account of the locality and nature of this property, to be condemned for this purpose.

And though I agree, that, for most cases and purposes, the public authorities in a state are the suitable judges as to this point, and that the judiciary only decide if their laws are constitutional, 2 Kent, Com. 340; 1 Rice, 383; that the legislature generally acts for the public in this, 2 Porter, 303; 3 Bl. Com. 139, note; 4 D. & E. 794, 797; that road agents are their agents, under this limitation, 1 Rice, 383; yet I am not prepared to agree, that if, on the face of the whole proceedings, — the law, the report of commissioners, and the doings of the courts, — it is manifest that the object was not legitimate, or that illegal intentions were covered up in forms, or the whole proceedings a mere “pretext,” our duty would require us to uphold them. *Id.*; Rice, 391. In England, though this power exists, yet if used maliciously or wantonly, it is held to be void. *Boyfield v. Porter et al.*, 13 East, 200.

In this case, however, while the fairness of it is impeached by the plaintiffs in error, yet on the record the object avowed is legal. It was to make travel free where it was before taxed; and the bridge, though remote from the changes desired in the old road, was still situated on the great line of travel over it, and not merely by color and finesse connected; and, from increases in population and business, seemed proper to be made free at the expense of the town or county.

Nor on the face of the record do the proceedings seem void, because the assessment may have been without a jury, when it was made by the legal officers, appointed for that purpose. 3 Pet. 280; 2 Dev. & Bat. 451, 460; *Beekman v. Sar. Railroad*, 3 Paige, Ch.

45. Nor void as made by the commissioners without notice, when the return states notice, and when there was a full hearing enjoyed by all before the court on the report.

Nor void because the compensation was too small to the corporation, — as it was assessed in conformity to law, — or too burdensome to the town alone to discharge, though the last might well have been flung on a larger number, like a county. 10 N. Hamp. 370 ; Tomlins, Dict., Ways, 2 ; 1 Rice, 392. Nor because the commissioners take a fee instead of an easement, when the legislature provide for a fee as more expedient. 2 Dev. & Bat. 451, 467. Nor because some of the property condemned was personal, when it was mixed with the real, and when real or personal, if needed and appropriate, may at times be liable. 1 Rice, 383.

With these explanations, I would express my concurrence in the judgment of the court.

THE RULES FOR ESTIMATING LAND DAMAGES.

Meacham v. Fitchburg Railway Company, 4 *Cushing's Reports*, 291.

Benefits to same piece of land may be set off against the value of land taken ; but not the benefits to other lands of the same party, not connected with the land taken.

The time at which the benefits are to be estimated is when the land was actually appropriated to the use of the railway, and no rise in the price of the land before that time, resulting from the general expectation that a railway was about being built at or near that place, can be taken into account in reducing damages for the land taken.

OPINION.

DEWEY J. The most important and difficult question in the case is that which arises upon the ruling of the presiding officer, as to submitting to the jury, in reduction of damages, the fact that the petitioner was the owner of other lands and buildings in Watertown, near to but not adjoining or parcel of the land described in the petition. This subject is confessedly one of difficulty. The general doctrine was very broadly advanced in *Commonwealth v. Coombs*, 2 Mass. 489, 492, that the benefit occasioned by laying out a highway to the other property of the party seeking to recover damages for his land actually taken should be considered in reduction of the damages for the land taken. The Rev. Sts. c. 24, § 31, in like manner, provide generally for an allowance

by way of deduction for such advancement in value of other property.

That there must be some limitation of the proposition, that the respondents may show in reduction of damages any collateral benefit which the petitioner has received in his other property, seems quite obvious. The party, whose land has been taken for a railroad, has a right, in common with his other fellow-citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith.

It would operate with great inequality, to hold that where there are various individuals, each owning large trading or manufacturing establishments in the immediate vicinity of a railroad, but without being adjoining to or connected with the located limits of such railroad, one of whom is the owner of a parcel of land, situate in another part of the town, over which the railroad is actually located, that as to the latter, he is, by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits, which he receives from the location of the railroad in the vicinity of his other land and establishment, while his neighbor, who is equally benefited, is exempt from any contribution to this object.

It is difficult to draw the line with precision, and at the same time to establish a rule, which will do equal justice to all concerned. The rule which was taken at the hearing before the jury, we think, approximates as nearly to the standard as any that can be adopted. It embraces the land as to which damages are claimed, and any land of the petitioner adjoining, or connected therewith, as one parcel or tract of land, and if in any portion of such land the location of the railroad has occasioned a rise in value, and the petitioner has received any peculiar benefit from the location of such road, it is the duty of the jury to make a deduction, by way of set-off, and a reduction of damages on account of such advancement in value of the remaining portion of the lot or parcel of land. Thus limited to the land adjacent to that taken for the railroad, or connected as one tract or parcel of land therewith, the rule will be found to be reasonable in itself and of easy application. The great and leading principle, to authorize such reduction of damages, is the direct benefit, or increase of value to the remaining part of the tract or parcel of land, by reason of the railroad's passing through the lot or tract, as to which the damages are claimed. We approx-

imate very nearly, in this way, to the rule of direct benefit, or actual increase of value in the adjacent land, and exclude the more uncertain and fanciful estimation of anticipated advantages to other parcels, more or less remote, and which share only in the common benefit of the lands of the citizens generally.

The further instructions to the jury upon this point seem to have been entirely correct, and in accordance with the principle of the other ruling. The respondents are not to have the benefit of any increase in value of the petitioner's adjacent land, so far as he has been benefited by the railroad merely in common with all the citizens of the neighborhood or village, by the anticipated general rise of property, by reason of the railroad's passing through the town and in the vicinity of their lands. It is only the increased value of the land of the petitioner, arising from the location of the road over some part of it, which is to be taken into consideration. If such location over the land of the petitioner has raised the value of his adjacent lands, then a reduction or offset is to be allowed the respondents on that account.

It is the increase of value occasioned by the location, and of course has reference to the state of things existing at the time when the land is taken by the location. The presiding officer directed the jury to take the earliest period indicating such location; namely, "the staking out of the road." This being most favorable for the respondents, it is unnecessary to decide, whether that period, or the subsequent one of the actual official return of the real location, would have been, strictly speaking, the more correct. The principle adopted was the right one, that the actual location of the road was the period of time in reference to which the increased value of the adjacent land was to be estimated with a view to the set-off. Upon the whole matter, the court are of opinion, that the verdict of the jury was properly accepted; and that the exceptions taken to the proceedings were rightly overruled by the court of common pleas.

The Supreme Court of Pennsylvania say that the decisions in that state have established the rule that the measure of damages for building a railway through a man's land is the difference between the value of the land before the road was built and its value after the road is finished. In estimating the disadvantages resulting from the road, consequential or speculative damages are to be rejected; and in estimating the advantages, such only as are special and peculiar to the property in question are to be considered, and not such as are common to the public generally.

It is the business of the viewers, in the first instance, and on appeal of the jury, to balance the advantages that are special against the disadvantages that are actual, and with the aid of whatever testimony is laid before them, to find out as well as they can how much less the land would bring in market by reason of the road; and that sum, which will represent what has been really taken away from the owner, should be given back in damages. *Hornstein v. Atlantic and Great Western Railway Co.*, 51 Penn. St. 90; see also *Giesy v. Cincinnati, Wilm. & Z. Railway*, 4 Ohio N. S. 308.

THE APPRAISAL INCLUDES EVERY KIND OF CONSEQUENTIAL DAMAGE POSSIBLE TO OWNER, WHETHER ANTICIPATED OR SUSCEPTIBLE OF BEING ANTICIPATED BY THE APPRAISERS, OR NOT.

Dodge v. The County Commissioners, 3 Metcalf's Reports, 380.

The damages occasioned by laying out and making a railway, and which, by Rev. Sts. of Mass.c. 39, § 56, County Commissioners are bound to estimate, include injuries which are done, by a railway corporation, to buildings near the line of the road, by means of blasting, in a proper manner, a ledge of rocks through which the railway passes.

OPINION.

SHAW, C. J. This is an application for a writ of mandamus to the commissioners, requiring them to assess damages for the petitioners against the Eastern Railroad Company. The facts, as set forth in the petition and admitted by the answer of the commissioners, are that the plaintiffs are owners of a lot of land in Beverly with a house thereon, situated near the limits of the railroad, but not within them; that the railroad is near a ledge of rock; that the company, by the necessary operation of blasting said ledge of rock, for the purpose of grading their railroad, greatly damaged and nearly destroyed the petitioners' house.

This case presents the question, whether, under the provisions of the revised statutes respecting railroads, one can have compensation for damages, whose land has not been directly taken for the site of the railroad, nor for supplying materials for its construction.

It is not now necessarily a question, whether the property of an individual, thus necessarily and injuriously affected, and in effect withdrawn from the profitable use and beneficial control of the owner, is appropriated to public uses, within the provision of the 10th article of the declaration of rights. It was quite competent for the

legislature, in providing for the prosecution of a great public work to require compensation to be made to persons injuriously affected by it, though not a case coming within the express requisitions of the bill of rights; and the corporation, by accepting the act of incorporation, became bound by such provisions. It is a question, therefore, depending on the construction of the Rev. Sts. c. 39, which are referred to and made part of their act of incorporation.

It is contended, however, on the part of the railroad company that the remedy for a damage like that of the petitioners, where no land is taken or appropriated, is not to be sought by an application to the county commissioners, but by an action at common law. But it has been truly answered, on the part of the petitioners, that it is a reasonable and now well-settled principle, that when the legislature, under the right of eminent domain, and for the prosecution of works for public use, authorize an act or series of acts, the natural and necessary consequence of doing which will be damage to the property of another, and provide a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrong-doer; an action will not lie as for a tort; and the remedy is by the statute, and not at common law. *Stevens v. Middlesex Canal*, 12 Mass. 466; *Stowell v. Flagg*, 11 Mass. 364; *Lebanon v. Olcott*, 1 N. Hamp. 339; *Calking v. Baldwin*, 4 Wend. 667.

Still the question recurs, whether the statute does provide such remedy in the case stated. The provision is this: "Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out, and making and maintaining their road, or by taking any land or materials as provided in the preceding section," &c. Rev. Sts. c. 39, § 56.

The court are of opinion, that the provision is broad enough to embrace damage done to real estate, like that which the petitioners have sustained. It is like the case of a house situated on the brink of a deep cutting, so as to become insecure, and so that it is necessary to remove it. It is a damage occasioned by the laying out and making of the road.

But it is contended that this is to be limited, by reference to §§ 54, 55, providing for the taking of lands for the line of the road, and also for materials, if without the limits of the road, by authority of the commissioners. But we can perceive no ground upon which the plain provision of § 56 is to be so limited. It undoubtedly pro-

vides for damages in those cases ; but it does not limit the provision to those cases.

But it is said that the damage done to the petitioners' house, not on the line of the railroad, was accidental and consequential, and not the necessary effect of making the railroad.

The statement made in the petition, and admitted in the answer, is, that the company located and constructed their railroad, through land next adjoining that of the petitioners ; that they contracted with persons to blast a ledge of rocks, in such adjoining land, and agreed to indemnify them against any damage arising therefrom ; and that, in blasting said rocks, the house of the petitioners was necessarily destroyed.

An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railroad is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precautions can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work ; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute.

Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. Such careless or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages. This court are therefore of opinion, that an alternative writ of mandamus be awarded to the county commissioners, to assess the petitioners' damages or return their reasons for not doing so.

In *Sabin v. Vermont Central Railway Company*, 25 Vermont, 363, the principal question was in regard to the jurisdiction of the commissioners appointed to estimate land damages under the defendants' charter as to consequential dam-

ages to land not taken. In this case, the words of the act of incorporation are of very great extent in regard to the appraisal of consequential damages to all owners of land or real estate any portion of which is taken, which was the plaintiff's case; the court say, —

“The owner is to have appraised to him all damages which he shall be likely to sustain by the occupation of his land for a railway. This must include, not only all direct loss, in being deprived of the use of the land taken, but all consequential damage to the remaining lands, which may fairly and reasonably be supposed to have been within the contemplation of the commissioners in making their appraisal.

“This, too, must have reference, not only to the running of the road, but to all special and peculiar annoyances during the construction of the road. But it must be, of course, the ordinary and probable consequents of such acts and operations; that which is not of the ordinary course of consequents is not to be taken into the account; and what is not to be taken into the account in making the appraisal, is not of course barred by the appraisal and payment of the damages.

“The claim for the use of plaintiff's land by defendants, for a cartway during the construction of their road, would seem to come clearly without the limits of the appraisal. The most that could be said to come fairly within the appraisal, in regard to the use of the adjoining lands, for passage during the construction of the railway, would only extend to gaining access to the land taken. It could scarcely be claimed, that the use of the adjoining land, for a cartway, could be fairly within the contemplation of the appraisal. It could not then be known, with any degree of practical approach towards certainty, how much material at any given point it would become necessary to bring from a distance, or at what point it would be necessary to use the adjoining land as a cartway, or whether any such necessity would occur. And indeed, it is ordinarily supposed, that the cartways will be upon the six rods taken for the railway. And where a different course is pursued, it is ordinarily done for convenience, and not of necessity. So that such a use, without permission, is ordinarily a mere trespass. There seems, therefore, to be made out a right of recovery to this extent.

“But the other portion of the plaintiff's claim seems not to come fairly, certainly not clearly, within the same general principle. And it presents a question undoubtedly of very considerable difficulty, when we are inquiring for the mere equity of a particular case. But all cases, and especially cases involving such mighty interests, and ultimately such vast consequences, in the infinity of their number and variety, must be decided upon such general principles of reasoning and justice, as commend themselves to the common mind, regardless of those trivial inequalities in detail, which no degree of finite labor or wisdom can fully prevent or equalize.

“In this case, if ledges, or loose stone of considerable size, are upon the land taken for the track of the road, at the time of the appraisal, it would naturally be in the mind of the appraisers, that the stone must be removed in the course of constructing the road; and being of a character only removable ordinarily by blasting, it must occur to them, that fragments, more or less, must be thrown upon the adjoining lands, and that it would be necessary to go upon the land, to remove such fragments.

“It would be the duty of the company, no doubt, to conduct this blasting in such a way as to do the least possible injury to the adjoining lands; and when, by such operation, stones were thrown without the limits of the land taken by the road, by unavoidable necessity, to remove them as soon as it could reasonably be done. And the fact, that such fragments were embedded in the soil, could make no difference. It could not be allowable for them to suffer the stone to remain thus. There is no necessity for this, but there is for throwing them, to some extent, upon the adjoining land.

“It seems probable enough, from the facts detailed in the present case, that the damages sustained arose chiefly from not removing the stone in due season. But the recovery below went upon the ground, that the defendants had no right to throw the stone upon the plaintiff's land. It therefore becomes necessary to consider that question. The Massachusetts courts seem to have considered, that for damages of this character, no action will lie, if there is no want of ordinary care on the part of the company. And no doubt, for any such want of common care, whether in conducting the operations of construction, or in not relieving a party from necessary temporary loss or inconvenience, the action should be case, and not trespass. And the party is not to be made a trespasser, *ab initio*, by mere nonfeasance. (*Stoughton v. Mott*, 25 Vt. 668. Indeed, it has not been claimed that the plaintiff might maintain trespass for this injury, except upon the ground that the defendants had no right to throw the stone upon the plaintiff's land.

“It seems to us very obvious, that the right of the defendants to blast these rocks, in a reasonable and prudent manner, did exist, and was conferred by the decision of the commissioners appraising the plaintiff's damages. And if we test the effect of that adjudication by the ordinary test of the extent of judgments, in merging claims, viz., that every claim is barred which was presented, or which might have been presented, under the particular question before the commissioners, there will be little ground of question remaining. The plaintiff had the right to claim, and was of course bound to present his claim, for all damages he was likely to sustain, not only in the running of the road, by fires of engines, and the like, but in the building of the road, in the ordinary mode, where blasting is universal, and this not in respect of the land taken only, but of the remaining land, as has been repeatedly decided. And if this claim was not presented, when it might have been, it is barred upon general principles universally recognized, that no one shall be again called in question for what was, or what might and should have been, adjudicated.

“It seems to us, that to deny the defendants the right to excavate by blasting, is to deny them the right to construct their road; and if they have the right to blast, they are no more liable, or in any different form, from what all citizens are, for the prudent conduct of their legal business, which may be attended with injurious consequences to others. If the throwing of fragments of rock is an unavoidable consequence, then so far as the owner of land taken is concerned, his probable and prospective damage as to his remaining land is to be appraised; and if he does not make such claim, or if more damage occurs than was anticipated at the time, he is equally barred, as if his claim had been presented, or less damages had occurred than was appraised.

“As we have intimated, it is clear, that for blasting at improper seasons, thereby causing unnecessary damage to crops, and for doing it in an imprudent or unskilful manner, or for not removing the stone in due time, — and that must be considered the shortest time in which it can be done, and with the least injury to the land, — the party is entitled to his remedy in the proper form. But if the defendants’ charter confers the right to do the act, of which, as we have said, there can be no doubt, it seems to us impossible to allow the action of trespass for the original act, thereby treating it as unlawful. And it is too well settled, to be now brought in question, that no mere omission, or want of care or skill, in doing a lawful act, will render such act a trespass by relation.

“In a late English case (*Sharrod v. London and Northwestern Railway Co.*, 4 Eng. Law & Eq. 401), it is held that a railway train being under the control of a rational agent, the company are never liable in trespass for any damages done by such train. This is undoubtedly the general rule in relation to master and servant, unless where the master gives express command to the servant to do the act. But if that rule is to be applied to railway companies, to the fullest extent, they are never liable in trespass, for it is scarcely supposable that they would, by a corporate vote, direct an act which should prove unlawful. Certainly they would seldom do this. Most of the acts of railway companies, in their construction and operation, are done by their servants and agents, without any corporate vote. It would be absurd to conjecture for a moment, that the multifarious detail of the business of such a company came even before the board of directors. It is almost of necessity, in order to secure efficiency and despatch, with any tolerable degree of safety, intrusted, almost without restriction, to one directing and controlling mind. All the acts then of this superintendent, and of his subordinates, who are from necessity the merest instruments, and the more so the better, as railway men tell us, should be regarded as the acts of the company. (*The Vt. C. R. Co. v. Baxter*, 22 Vt. 365.)

“The case of *Dodge v. The County Commissioners*, 3 Met. 380, goes to the full extent of the decision we here make, possibly further. And the Massachusetts statute in regard to appraisal of damages to the owner of the land, a portion of which is taken, is the same as the statute of this state.

“The result is, the judgment of the court below must be reversed, as to all the damages awarded upon this latter point; and if the party chooses to waive this portion of his claim here, the judgment for the remainder will be affirmed in this court.”

WHERE THE STATUTE COVERS THE ENTIRE GROUND OF DAMAGE FOR LAND TAKEN, AND ALLOWS NOTHING FOR LAND INJURIOUSLY AFFECTED BUT NOT TAKEN, NO ACTION AT COMMON LAW CAN BE MAINTAINED.

Hatch v. Vermont Central Railway. Whitcomb v. Same, 25 Vermont Reports, 49.

Railway companies are not liable for necessary consequential damages accruing to premises not taken by them for the prudent construction and operation of their roads.

But they are liable, for diverting a stream of water from its natural course, to the injury of a neighboring proprietor.

THESE actions were trespass on the case. The claim of Hatch was for consequential damage to his premises, lying near the railway of defendants; but not taken for the purposes of the road.

The claim of Whitcomb was based on the facts, that defendants had built their road over his land, and across a stream running through it, and had built no proper culvert or sluice for the stream; but had diverted the stream from its course, to the plaintiff's injury.

OPINION.

REDFIELD, C. J. The very great importance of the principal question involved in this case, led, with great propriety, to an elaborate discussion at the bar, and the court have devoted all the time, at their command, to an extended examination of all the cases cited, and some others. It is certain there is not, as yet, a perfect coincidence of views in regard to the rights, duties, and obligations of railway corporations, either in this country or in England. But legislation is every day removing more or less of those uncertainties which have hitherto existed, and in some instances led to more or less of injustice, on the one hand or the other.

Legislation, in the infancy of all new undertakings, is more imperfect than it will be likely to be when such projects are more fully matured. This is especially applicable to our legislation in regard to railways. And the consideration, that many, perhaps most, of the early charters granted in this state, were, at the time,

regarded as experiments merely, and the roads not likely ever to be built, certainly not until extension of their charter limitations would be required, which would enable the legislature further to guard the rights of those likely to be injuriously affected by them, has led to the granting of many charters for railways in this state, without all those restrictions and limitations which are common in England and in many of the American states. Hence it is not always easy to impose upon these companies the obligations to do, in all cases, what simple justice requires, and those who suffer essential, and sometimes perhaps ruinous, injuries, or rather damage, by their construction and operation, must be content to take the law as it is. They must remember, that courts do not ordinarily make the law, upon this subject, more than others, but only take it as they find it, ready made to their hands, and apply it in such a manner, and to such cases, as it seems it was intended to reach. If others are altogether omitted, the sufferers must be content to wait their time of deliverance, which, whether it comes sooner or later, or never, is better to be thus delayed, than that the law should become the mere arbitrary discretion, and personal will of the judge, or the court, which has been regarded as no bad definition of tyranny itself.

We have been led to these reflections, partly, by what we may explain more fully hereafter, but chiefly to correct a very common misapprehension upon this subject, with parties certainly, and the profession sometimes, that if the law is not made always to effect the most perfect justice, the fault is in its application, the law itself being always supposed to be perfect.

The important question in the case is, how far this railway company is liable for consequential damage, to lands near their track, but no part of which is taken, by them, for any purpose. It seems to be conceded in the argument for the plaintiff, and assumed on all hands, that nothing in the company's charter, or in any general statute of the state, in force at the time, in terms made them liable for such damage. Indeed, this assumption seems indispensable to enable the plaintiff to get along with his case. For if such remedy is given by statute, it is probably exclusive, or at all events it would doubtless often have been resorted to long before this. But no such claim has ever been made, by any one; and this may be regarded as pretty satisfactory proof that no such express provision exists. The English courts seem to consider a

provision in the charter for assessing damages, in a summary way, exclusive and not a cumulative remedy. *East and West India Docks, &c., v. Gattke*, 3 Eng. Law & Eq. 59; *Watkins v. Great Northern Railw.*, 6 id. 179.

It must be conceded, then, that so far as a general, unqualified grant of the legislature will enable the defendants to build the road, and continue its operation, without liability for consequential damage to the proprietors of the land, not taken, they are acquit of all such liability. There is no doubt the legislature might have granted the charter with this liability attached to the company, or any other which they saw fit to attach. The accepting of the charter was not imperative upon the company. But having accepted it, they are bound by its conditions, and entitled to all its privileges. And it seems to us fair to assume, that no such obligation being imposed upon the company, in the charter, or by the general statutes of the state then in force, it was the purpose of the legislature to exempt them from such obligation, so far as they had the power to do so. The reason for doing this, it is scarcely needful to discuss. It was doubtless esteemed some object to encourage such companies to build their roads. The extent of such injuries had not been much considered, perhaps, at that time, and almost all our citizens then esteemed it a desideratum, to bring a railway as near them as possible, the nearer the better. I should not probably be able to give much force to an argument, which is said to influence some minds, that it would be impossible for any company to stand up under such a burden. I should probably think, if such was the statute or the law, that they must stand up under it, or fall before it. And it seems to me, that such a statute regulation, which exists in England, and in Massachusetts, and perhaps in some of the other states, is highly equitable and just. And if these public works cannot be maintained upon fair and just grounds, by individual enterprise, they must be fostered by public grants, or delayed till they can be thus maintained. But if instead of this, the legislature sees fit to annex no such condition to the charter, and thus virtually, so far as they have the power, exempt them from any such obligation, the company are entitled to have their rights fairly, and fully vindicated, in the tribunals of the state, the same as other citizens. Nor should this be done grudgingly, or by compulsion, but justly and equitably, the same as in other cases of like character. If the character of parties should come to be

the measure of their rights, and this to be determined by the fallible judgments of imperfect humanity, swayed or seduced by the conceits, the passions, and the prejudices of the moment, men might almost as well resort at once to their ultimate rights, before civil government existed.

If, then, the legislature have purposely exempted this company from such an obligation, we do not well perceive how the plaintiff will be fairly able to deprive them of the benefit of the exemption, unless he can show that such an exemption is a violation of the constitutional restrictions upon the power of the legislature, or else that it is exempting a particular person from the general liability, by law attaching to all other persons, similarly situated, and in such case, the exemption would be void, probably, as an act of special legislation, upon general principles of reason and justice, like a particular act, allowing one citizen perpetual exemption from punishment for all offences, or from all liability for torts.

Perhaps it may be useful to consider this latter ground first. It should be premised, in the very outset, that it is no fair test of the general liability of a railway company for their acts, to argue from what natural persons may lawfully do, and what, if done by them, becomes a nuisance. There is no doubt, that if an individual, or a mere partnership, should do all, that the defendants' company do daily, in the village of Burlington, they would become indictable for the continuance of a common nuisance, and a mere statute of exemption from liability to prosecution for crime would not affect their liability. And any citizen suffering special damage, by means of such nuisance, might have his action, or enjoin the offenders ordinarily, in equity.

But here the sovereignty of the state have seen fit to confer upon this company an important franchise, a considerable portion of that sovereignty which themselves possess, the right to construct and continue a railway, almost from one extreme of the state to the other, with slight limitations as to its course, and providing no tribunal but their own engineers to determine its location. The location which they adopt, then, is conclusive of their rights to build the road in that place as to every one, unless resisted by some proceeding, taken at the time of the location, and brought to bear directly upon the question of the locating of the road. If the plaintiff, or others interested in the location of this road, would insist that it is improperly located, inasmuch as it is in a

too populous portion of the village, to allow of such a work, this should have been done, by mandamus, or injunction, or some proper process, to arrest and correct the evil, at the time of its being built. But it is now too late to bring this matter in discussion, perhaps, in any form, or at any time, since the decisions in *Lexington and Ohio R. R. v. Applegate*, 8 Dana, 289, reversing the decision of Chancellor Bibb; *Philadelphia and Trenton R. R. Co.*, 6 Wharton, 25; and many other cases, and especially the discussions in regard to the railways in the city of New York, and the fact that in the largest city upon the continent, the efforts of the constituted authorities have hitherto been found almost powerless for the regulation merely of the operation of railways, and locomotive engines, in her principal thoroughfares, and have made no approach towards an exclusion of them even there.

It will, therefore, scarcely be claimed that the operations of the defendants, in the village of Burlington, are a mere nuisance. There was nothing in the proof tending to show that they were so conducted as to be made such by reason of mismanagement as to the time and manner of carrying on their operations, as seems to have been held in *some* of the New York cases, where the operation of engines, near a church, on Sunday, during the time of public worship, was regarded as actionable, as a common nuisance, causing special damage to this church as a corporation. *The First Baptist Church, &c., v. Sch. & Troy R. R. Co.*, 5 Barb. Sup. Ct. 79. But the precise contrary doctrine was held, it seems, in *The First Baptist Church, &c., v. Utica R. R. &c.*, 6 Barb. Sup. Ct. 313. And in *Drake v. Hudson R. R. &c.*, 7 Barb. Sup. Ct. 508, it was held generally, that a road running through streets in a city does not amount to the infringement of private rights, provided the passage is left free to travel. The owners of property bounded on streets have no exclusive right of property in them. It belongs to the corporation, *the legal owners of the soil*, to manage and regulate the use of the streets. See note to 7 ed. Kent's Com. 2 vol. 398, by Kent & Eaton. It is said, in the last case, that for any injury done to the adjoining proprietors they may have an action on the case.

The question still recurs, what is to be regarded as a legal injury? If the operations of the railway in that place are to be regarded as altogether legal, and the adjoining proprietors have no interest in the soil under the street, as in the case of an ordinary

highway in the country, which seems to be the view taken by the court here, then the ordinary carrying forward of the business of the railway, although it may cause annoyance and damage to the dwellers along the street, could scarcely be regarded as a legal injury, for which an action will lie. In the language of the law, it is *damnum absque injuria*. If the company constructed their road in an improper manner, thus causing needless damage to the adjoining proprietors, or if they wantonly or negligently run their cars, or carry on their operations, so as in any manner to cause needless damage to such proprietors, they would be entitled to a remedy, by action.

But, upon general principles, the defendants may conduct their lawful business, in a reasonable and prudent manner, "with as little injury to plaintiff's premises as was consistent," &c., in the language of the bill of exceptions in this case. It seems to be well settled law, that the first occupier of land acquires no right (within the period of prescription for presuming a grant) to exclude an adjoining proprietor from the free use of his land, in any proper mode, by erections or excavations. A building, which has stood more than twenty years, is presumed to have a grant to have its walls supported by the adjoining land, and that its ancient lights shall not be darkened. 1 Bac. Ab. 77, citing 22 H. 6, 15; 9 Co. 59; Bland's case, cited Bulstrode, 115; 2 Rolle's Ab. 107, 143; 3 Leon. 93. The same rule is laid down in all the elementary writers, and generally recognized in the English Reports. But, in some of the American states, this doctrine of ancient lights is questioned, or denied. *Parker & Edgarton v. Foote*, 19 Wendell, 309. But when no such question arises, the adjoining proprietors may excavate or put up erections to any extent, with impunity, using proper precautions to cause no unnecessary damage. Prior occupancy gives no exclusive rights. *Panton v. Holland*, 17 Johns. 92; *Thurston v. Hancock*, 12 Mass. 220, where the subject is very elaborately discussed and satisfactorily determined. It is here held, that if one, by digging into his own soil, cause the surface of his neighbor's land to slide into the pit, or cause damage to his neighbor's erections, by not using proper and reasonable precautions in making his excavations, for such damage, an action will lie, but not for removing his earth in a prudent manner, whereby his neighbor's soil or erections caved and fell, by reason of extraordinary weight, put upon the land.

The same doctrine is elaborately discussed, and fully applied, in the case of *Lasala v. Holbrook*, 4 Paige, 169. In *Partridge v. Scott*, 3 M. & W. 220, Baron *Alderson* says, "Rights of this sort, if they can be established at all, must have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire a right of easement, for support or otherwise, over the land of his neighbor." *Wyatt v. Harrison*, 23 E. C. L. 205, is a full authority, to the same extent. Lord *Tenterden* says, "It may be true that if my land joins that of another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land, so as to cause mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." This may be now regarded as the settled law upon this subject.

And this same principle has been extended to the construction of public works in England and this country. *Governor of Plate Manufacturers v. Meredith*, 4 T. R. 794. Lord *Kenyon* says, "If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power given the commissioners the parties are without remedy, provided the commissioners do not exceed their jurisdiction." This was a case where the plaintiffs had been hindered in the free access to their business premises by the raising of the street opposite them, by the defendants, who were commissioners for paving the street; not very dissimilar, in principle, to the plaintiff's case. *Sutton v. Clarke*, 1 E. C. L. 298; *Boulton v. Crowther*, 9 id. 227; *King v. Pagham*, 15 id. 237. The same, or similar principles have been repeatedly declared in this country; *Henry v. The Pittsburgh and Alleghany Bridge Co.*, 8 Watts, & S. 85. But in this case the plaintiff recovered damages for the negligent manner in which the street was altered, thereby throwing water needlessly upon plaintiff's land. *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71; *Commonwealth v. Fisher*, 1 Penn. 462, and other cases stated more at length in the note.

From all which we must infer, that the defendants are not liable upon general principles for necessary consequential damages, accruing to the plaintiff's premises or business, by the prudent erection

or operation of the defendants' road, and not being made so by statute, but impliedly exempted from all such liability, it only remains to inquire how far such an exemption is consistent with the constitution of this state.

If this question were entirely new, it would certainly be attended with more difficulty, and would justify a far more extended examination than would now seem excusable. The article embracing this subject in our state constitution is in these words: Part I. Art. II. "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, ————— the owner ought to receive an *equivalent in money*." The corresponding provision in the United States Constitution is in these words: "Nor shall private property be taken for public use, without just compensation." Reference to the United States Constitution is important only, as showing how similar provisions are expressed in different constitutions, all having the same general object in view. This constitutional provision is not of American origin. It existed in the Roman Empire, and in the English constitution, and in most, if not all, the modern European states. In the Code Napoleon, Book II. Title II. 545, it is thus expressed: "No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity." This subject is discussed much at length by the civil law writers referred to in Chancellor Kent's elaborate note upon the subject, 2 Com. 7 ed. 393. It is scarcely needful to go much at length into the general subject here. The learned commentator contends, very strenuously, for compensation *in money*, to the extent of the value of the land taken. And how the Vermont constitution can fairly bear any other construction, is to me difficult of apprehension. That view is maintained in *Vanhorne v. Dorrance*, 2 Dallas, 304, by Justice *Patterson*. And as the subject of the mode of compensation was discussed in this country, at an early day, it seems probable that it was limited in this state to a money compensation, *de industria*. And that probably led the court to adopt a rather anomalous view of the subject as it might seem to some, in *Livermore v. Jamaica*, 23 Vt., 361, limiting the constitutional provision to the taking the fee of the land. That seemed to be the practical construction put upon it in this state from its earliest adoption, and perhaps the court were justified in making the decision they did upon the ground of its practical construction.

But altogether aside from any express provision of the constitu-

tion, a statute taking property without necessity of a public character, or without compensation in some form, would doubtless be regarded as entirely without the just limits of legislative power. It is so regarded in North Carolina, where they have no express constitutional provision upon the subject. *Railroad Company v. Davis*, 2 Dev. & Batt. 451. But in South Carolina, where no such constitutional provision exists, it was decided by a divided court, that compensation was not indispensable. But the better law is regarded as embodied in the dissenting opinion of Mr. Justice *Richardson*, *State v. Dawson*, 3 Hill, 100. Assuming then that it is necessary, upon general principles, to make compensation to the proprietor in some form, even where a less interest in land than a fee is taken, the extent of the compensation is still open. See also *Wilkinson v. Leland*, 2 Pet. 627, *Story*, Justice.

It seems little better than an evasion to say, that no compensation is required, where a perpetual easement in the land is taken, for public use. There is the same reason and justice, in allowing compensation in such case, as where the absolute fee is taken. And it has always been so regarded. But the general rule may now be regarded as settled in this country, that any advantages accruing to the proprietor of the land taken by the contemplated public work, may be taken into the account in appraising the damage. So, too, where any portion of the land is taken, the commissioners may doubtless estimate consequential damages, to the remaining portion of the land. It is scarcely possible to come fairly at the value of the land taken, or the actual damage suffered in any other mode. *Symonds v. The City of Cincinnati*, 14 Ohio, 147, Justice *Read*, dissenting. The charter of defendants, Sec. 7, requires the commissioners to appraise such damage to the owner of land taken, as he may have sustained, or shall be liable to sustain, by the occupation of the land for the purpose aforesaid. It is not now regarded as essential that the damages should be paid in advance of assuming possession of the land as required by the Code Napoleon, and in some American cases. *Bloodgood v. M. & H. Railroad Co.*, 14 Wendell, 51, s. c. in error and reversed, 18 Wendell, 9. The same rule obtains in England at common law, *Lister v. Lobby*, 7 Ad. & Ellis, 124 (34 Com. Law, 51). But so far as this court have been able to learn, merely consequential damages to lands not taken, where no statute provision upon the subject exists, have never been regarded as entitling the party to compen-

sation, either from the state or those upon whom the state confers a public franchise in the exercise of which the damage occurs. The English Railway act gives the right to damages to the owners of all lands "injuriously affected." Under this statute the courts hold the corporations liable for all acts which would constitute a good ground of action, if done by a private person, without any authority from the state. So that there any act of a railway company, amounting to a nuisance in a private person, and causing special damage to any particular land-owner, is good ground of claiming damages by such land-owner. *Queen v. Eastern Counties Railroad Co.*, 2 Ad. & El. N. s. 347 (42 Eng. C. Law, 706) ; *Glover v. The No. Staffordshire Railway Co.*, 5 Eng. Law & Eq. 335 (May 1, 1851).

But in the absence of all statutory provision to that effect, no case, and certainly no principle, seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business to the payment of consequential damage to other persons in their property or business. This always happens, more or less in all rival pursuits, and often where there is nothing of that kind. One mill, or one store, or school, often injures another. One's dwelling is undermined or its lights darkened, or its prospect obscured, and thus materially lessened in value, by the erection of other buildings upon lands of other proprietors. One is beset with noise, or dust, or other inconvenience, by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railway as much as in the other cases supposed. One would not care if they were altogether excluded from cities and large villages. But the legislature have determined otherwise, and the plaintiff must be content to take his chance with other citizens. These public works come too near some, and too remote from others. They benefit many, and injure some. It is not possible to equalize the advantages and disadvantages. It is so with every thing, and always will be. We do not expect to have the consolation, if consolation it be, to know that these little inequalities will ever be made precisely equal with us all in this life. But it will be so at no very distant day, and it becomes a reasonable man, perhaps, not to magnify them inordinately, since they are so short lived, and so absolutely beyond the remedy of all human skill. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the

ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all the courts of the state in forty years. Hence they must be left, as all other consequential damage and gain is left, to balance and counterbalance itself as it best can. If the legislature had seen fit to annex a similar condition to these grants with that found elsewhere, making the company liable for damage to all land "injuriously affected by the road," it might have been very well and far more just than it is, but not having done that, and having made an unqualified grant to the defendants, thus legalizing their proceedings in building and running the road, it is impossible for the court to impose any further restrictions upon them, than upon other legal business which one carries on upon his own land.

But some of the cases seem to justify some limitation upon the right of railway companies, or other grants, for public purposes, in regard to diverting watercourses, rivers, and other streams. *Boughton v. Carter*, 18 Johns. 404, seems to require that such public companies should not needlessly injure the adjoining proprietors, by turning the water upon them, in such a manner, and at such points, as materially to injure them. Where it is practicable, within the range of any reasonable expense, to save the adjoining proprietors from damage, by the water flowing from the road, or from a natural stream of water, and this is not done, and the land-owner suffers damage, the company is liable to an action. The case of *Hooker v. New Haven & Northampton Company*, 14 Conn. 146, goes upon this ground, and extends the right of action to the land-owners below the works, no part of whose land is taken, but which is materially injured, by the defective manner in which the public works are constructed. It was held, too, by *Kent*, Chancellor, in *Gardner v. Newburgh*, 2 Johns. Ch. 162, that one could not be deprived of the benefit of a stream of water, by the state even, without compensation, and the defendants were enjoined from building an aqueduct, by public grant, until they made compensation to the proprietors of land, below the point at which it was proposed to divert the spring, for the supply of the aqueduct to the city of Newburgh. These, and some other cases of a similar character, seem to be founded in reason and justice, and not at all to conflict with the general principles before laid down by us, that the defendants are not liable for merely consequential damages, to land taken, or expressly

affected in themselves, as is the case where water is diverted, or caused to overflow the land. But, upon general principles, every one is liable for diverting a stream of water, liable for the damage caused to those from whom it is diverted, and to an action at law. One may use water running over his land, in any manner he chooses, but he may not divert it from its ordinary channel. The state cannot do this, more than an individual, unless it become necessary to the accomplishment of some public work, and in that case is bound to make compensation. Here the land is not taken, but the water, which makes the land valuable, is taken, and that is the same in law as if the land were taken. So, too, if by making imperfect sluices, or other passage for streams, which defendants' road crosses, the land of adjoining proprietors is injured, the defendants are liable, whether any portion of their land had been taken by the company or not, and whether damages for land taken had been appraised or not. This liability (*F. Whitcomb v. Vt. C. R. R. Co.*) is for an omission of duty in building their road, and is a virtual tort. Upon this ground, it seems to the court, that in the case of Frederick Whitcomb against the defendants, the plaintiff was entitled to recover his full damage. These damages were occasioned by the want of a sufficient sluice or culvert, which it was the duty of the defendants to build, and of this they seem to have been aware, as they built one of wood, which failed. The damages paid to Freeman present no impediment, as it seems to us, to the plaintiff's recovery, inasmuch as it was not competent for the appraisers to take into account any such prospective or possible damage to accrue from a neglect and breach of duty on the part of defendants. A contrary rule would be attended with great uncertainty, and great probable wrong. It is possible some of the cases from Pennsylvania, which we remarked upon more at length, in a note, may seem to favor the idea, that a railway company is not liable for diverting a stream of water, when it might be restored to its former state, but that certainly is inconsistent with general principles of reason and justice, and common law, and equally at variance with the express provisions of defendants' charter. Section 10 provides, that all watercourses and streams shall be restored, "to their former state and usefulness, as near as practicable." This would not impose upon the defendants impossibilities, as was held in *Queen v. Scott*, 3 Ad. & Ellis, N. S. 543 (43 C. L. R. 858). Nor will it probably require the defendants to build culverts where

it is not obvious that one will probably be needed, or where one would only be needed once in twenty, or thirty, or fifty, or one hundred years, in the most extraordinary freshets, and which might, therefore, be regarded as accidental, or the act of Providence, and not to be provided against by mere common prudence.

But, in the present case, it seems such a culvert or sluice was needful every year, and that this became known to defendants before constructing their embankment, and that they attempted to build one, which was so imperfectly built that it filled up. We think, therefore, the plaintiff is entitled to have such damages of defendants as he has sustained by reason of their not building such a culvert as would be ordinarily needful in that place, such as prudent men, under the circumstances, would have been likely to build. We cannot regard the deed of Freeman and wife as amounting to a license, to build their road upon the land granted, in any different manner from what they would have been entitled to do had they taken the right of way merely, in the ordinary mode. Indeed, such a deed of the fee of the land has been sometimes held only to convey the right of way to such corporation, that being all which it can properly hold. But not to discuss that point, it certainly could not be fairly regarded as giving a right to build the road upon the land in any other mode than that defined in their charter, restoring watercourses to their former state as far as practicable.

The result of all which would seem to be that, in the case of Hatch, the judgment must be affirmed, unless the plaintiff thinks it an object of some importance to him to have the question submitted to the jury, whether the road was built in a manner to do him no unnecessary damage. And this would seem to confine the claim for damage pretty much to the turning the water upon him, as the case is stated in the exceptions. In the case of Whitcomb the judgment is reversed, and the case remanded.

We have taken no notice of certain cases, where it has been held that railway companies are not liable for cutting off springs of water in making their excavations. For it is presumable that such cases go mainly upon the ground that such springs could not have been restored to their former state, or else they were covert, like a spring supplying a well. *Aldrich v. Cheshire R. R. Co.*, 1 Foster, N. H. 359, or perhaps that the payment of damage covered the loss which the party had sustained, by having the spring

cut off, where it was impossible to restore it. The case of *Francis Dodge v. County Commissioners of Essex*, 3 Metcalf, 380, seems to sustain the leading views which we have here taken.

See, in this connection, *Bradley v. New York & New H. Railway*, 21 Conn. 294, and note, *ante*, vol. 1, p. 295.

In the *New York & Erie Railway Company v. Young*, 33 Penn. St. 180, the court say, "It has been held by this court, in the *Monongahela Navigation Company v. Coons*, 6 W. & S. 101; *The Susquehanna Canal Company v. Wright*, 9 W. & S. 9; *McKinney v. Monongahela Navigation Co.*, 6 Harris, 65; *Shrunk v. Schuylkill Navigation Company*, 14 S. & R. 71; *The Philadelphia & Trenton Railway*, 6 Whart. 45, and *Rundle v. The Delaware & Raritan Canal Company*, 14 Howard, 80, that the grantees of such a franchise have the same power that existed in the state, and may exercise it, subject only to such restrictions as are imposed in the grant, and that they are subject only to the same liability, unless otherwise declared. Such grants are always supposed to be for the public benefit, and to be exercised with that view by the corporation, rather than by the state itself. In the cases cited, the doctrine has been distinctly held, and is the settled law of the land, if any thing can be settled, that unless the act of incorporation provides for it, consequential damages are not recoverable from a railway, or other improvement company, in constructing or maintaining their works. Thus applying the same rule to them as was held applicable to the commonwealth itself. *Commonwealth v. Fisher*, 1 Penn. 467. That the legislature may direct otherwise, nobody doubts; but the liability does not exist unless it is expressed."

Hortsman v. Lexington & Cov. Railway Co., 118 B. Mon. 218, where a right of way was granted to a railway company, and it was necessary to make deep cuts through the land granted, and the railway company left the banks of the cut without side-walls, or other protection, the court say, "Although it devolved upon the company, in the use of the way for the purpose contemplated, to observe proper care and precaution, so as to avoid unnecessary injury to plaintiff's property, and although a failure to do this would furnish a just ground of complaint for injury resulting from such failure, we are of opinion that it did not devolve upon the company to construct a wall, or erect any defences for the protection of the adjoining property from the consequences resulting from a proper and reasonable use of the way for the railroad, although such consequences would be injurious, and inevitably so, to the plaintiff. It is for injury resulting to a man from the careless and negligent use by another of his property, that the law affords redress to the former; the latter is not responsible for the lawful use of his own property, although such use may result in damage to his neighbor.

It is obvious, from the petition here, that the plaintiff knew to what use the way would be applied; the presumption is, that he estimated the damage that would necessarily result from the use of the way for a railway track."

RIGHT TO OCCUPY THE HIGHWAY EITHER BY EXPRESS OR NECESSARILY
IMPLIED PERMISSION OF LEGISLATIVE GRANT.

Springfield v. Connecticut River Railway, 4 Cushing's Reports, 63.

It is competent for the legislature, under the right of eminent domain, to grant an authority to a railway company to lay and maintain a railway over a highway, longitudinally.

But when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words, or by necessary implication.

It seems, that the inhabitants of a town in their corporate capacity have sufficient interest to enable them to maintain a suit in equity to determine whether such use of the highway by the railway company is justifiable under the powers granted them.

OPINION.

SHAW, C. J. This is a bill in equity, brought to enjoin the defendants from maintaining a railroad and running cars thereon, upon and over a public highway in Springfield, on the ground that such maintenance of the railroad is unauthorized, and constitutes a nuisance. It presents a very important question: one which, in the great multiplication of railroads, is likely to affect deeply the interests of many parts of the commonwealth, and which has not yet been decided.

A preliminary objection was taken, that the inhabitants of a town, in their corporate capacity, have no such interest in the preservation and protection of the highways and townways, within their limits, as will warrant them in applying to this court for the exercise of its jurisdiction, in case of nuisances, to restrain and prevent such nuisance. We have not examined the subject very thoroughly, but we are inclined to think that, as the town is responsible for the construction and amendment of highways and townways, and for damages to travellers for losses occasioned by obstructions and defects, they have a right to invoke the equity power vested in this court in cases of nuisance, to determine whether such a use of the ways, as is claimed by the defendants in the present case, is or is not a justifiable act under the powers granted them.

The fact, that since the suit was commenced the town of Springfield has been divided, and that the place where the nuisance is alleged to exist falls within the new town of Chicopee, has no effect to vacate the suit; because the act of incorporation contains a saving clause, which is sufficient to avoid any such effect.

We are then brought to the main question, namely, whether the defendants had authority, by the act of 1845, c. 170, § 1, granting them the right to build this branch, to build it over and along a public way previously established. It is stated and admitted, that Front Street, in Cabotville, is partly a highway, laid out and established by the county commissioners, and partly a townway, laid out by the selectmen, and the laying out ratified by the vote of the town. These two modes of establishing ways are both legal; and though one is called a highway, and the other a townway, yet, for most purposes, both are regarded as public ways, for obstructing which any party is liable to indictment, as for a nuisance, and for damage in consequence of any defect in which the town is liable to the sufferer. For all purposes of this inquiry, therefore, there is no distinction between them.

As the giving of authority to build and maintain a railroad is the grant of a right to take private property for a public use, and to deal with property appropriated to other public easements and uses, it is manifestly a high exercise of the sovereign right of eminent domain, and can only be effected by the clear and unequivocal authority of the legislature, who are constituted the judges of what the public good requires.

It is somewhat remarkable that, in a matter so deeply affecting private rights and interests, the precise location or line of railroad, on the ground, is not fixed by the act granting the power, nor is it provided that it shall be fixed by any board of public officers, who may be supposed to act impartially. In laying out highways, the precise course of location is fixed by the county commissioners, formerly the court of sessions, a public body of disinterested officers, supposed to act as impartial arbitrators between the public and individual proprietors.

But in railroads, the authority to the corporation is to locate, construct, and complete a railroad within certain termini, giving the general direction, but leaving the precise location to be determined, not by the county commissioners, but by the company. The corporation must file their location with the commissioners within one year, defining the courses, distances, and boundaries, but the commissioners have no power of prescribing or altering it. Rev. Sts. c. 37, § 75. So, after having made a location, the corporation may vary it, and take other lands within the limits prescribed by their act of incorporation, and file a location of such variations. Rev. Sts.

c. 39, § 73. And, on the petition of any railroad corporation, the commissioners may authorize an original location, or an existing location, to be altered, without the limits prescribed by the charter of such corporation. Rev. Sts. c. 39, § 74. Considering how large the powers are which are thus vested in railroad corporations, the court are of opinion that they ought to be construed with a good degree of strictness, and not enlarged by construction.

The authority, under which the defendants claim to have located and laid out the railroad in question, is found in the act of 1845, c. 170, which was passed in addition to the act of 1842, c. 41, by which this company was incorporated. The act of 1845 provides (§ 1) that the company may construct and open for use a branch railroad from the main track of the road, in Cabotville, to and near the mills in said village, passing up the south bank of Chicopee River, near the same, and thence extending up said river to the Chicopee Falls village; the location of that part of the branch now in question, from the main road to the mills in Cabotville, to be filed in one year from the passage of the act, and that to Chicopee Falls village in five years. The act further provides (§ 3) that said corporation, in the construction of their railroad and branch, shall have all the powers and privileges, and be subject to all the duties, restrictions, and liabilities set forth in the Rev. Sts. c. 44, and in that part of c. 39 which relates to railroads.

It is the common case of an act, authorizing the location and construction of a railroad between termini, one of which, the junction, as the *terminus a quo* is fixed, and the other, the *terminus ad quem*, "to and near the mills in Cabotville;" and the course or line is no more exactly designated than by the terms, "passing up the south bank of Chicopee River, and near the same," and thence extending up said river to Chicopee Falls village. The beautiful and apparently accurate survey and plan of a part of Cabotville, and of the river, the streets, and the track of the railroad, exhibit all these localities to great advantage, and present the question at a single glance.

As no company or persons have authority to lay out a railroad, except so far as such power is conferred by the legislature, the court are of opinion that, by a grant of power by a legislative act, to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, no authority is given *prima*

facie to lay such railroad on and along an existing public highway longitudinally, or, in other words, to take the road-bed of such highway as the track of their railroad. The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation, on the subject of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made to regulate such crossings by determining when they shall be on the same and when on different levels, in order to avoid collision; and when on the same level, what gates, fences, and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant, should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travellers on both. The absence of any such provision affords a strong inference that, under general terms, it was not intended that such a power should be given.

But the court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant such an authority. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim: *Salus rei publicæ lex suprema est*, to which all minor considerations must yield, and which can only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent. Land appropriated to a public walk or training-field may, in case of war, be required for a citadel, when it is the only ground which, in a military point of view, will command all the defences of a place, in case of hostile attack. *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Railroad Co.*, 4 Gill & Johns. 1; *Boston Waterpower Co. v. Boston & Worcester Railroad Corp.*, *ante*, p. 280; *Wellington v. Middlesex*, 16 Pick. 87, 100.

But when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words, or by necessary implication. There may be such a necessary implication. Every grant of power

is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplates and sanctions that consequence. Take the familiar case of the Notch of the White Mountains, a very narrow gorge, which affords the only practicable passage for many miles through that mountain range. A turnpike road through it has already been granted. Suppose the gorge not wide enough to accommodate another road, but the legislature of New Hampshire, in order to accommodate a great line of public travel, should grant power to lay a railroad on that line; they would, by necessary implication, grant a power to take some portion of the road-bed of the turnpike.

In the present case, it is manifest that there are no words in the act of 1845 which give the defendants authority to locate and construct their railroad over Front Street, where it was actually laid, or over any other highway in Cabotville; and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exist, it must arise from the application of the act to the subject-matter, so that the railroad could not, by reasonable intendment, be laid in any other line. The grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if, to the minds of reasonable men, conversant with the subject, another line could have been adopted between the termini, without taking the highway, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway.

Whether the laying of this railroad, on and over Front Street, was necessary, that is, reasonably necessary, as above explained, in order to accomplish the object contemplated by the legislature, depends upon the application of the act to the localities; and this warrants and requires evidence *abundante* to establish the facts. It is a fit case, therefore, in our judgment, to be referred to three commissioners, of competent skill and experience in such subjects, to examine the whole subject, and to consider and report:—

Whether, under the grant of an authority to the defendants to

construct and open for use a branch railroad, from the junction or main track of their road in the village of Cabotville, to and near the mills in said village, passing up the south bank of Chicopee River, near the same, and thence extending up said river into the Chicopee Falls village, it was, by fair and reasonable intendment, necessary to lay and construct the same upon and along Front Street, or either of the public ways in Cabotville, or not; and, as incident to this inquiry, to consider whether, by such fair and reasonable intendment, the said railroad could or could not have been laid out and constructed, 1st. Between Front Street and the canal; or, 2d. Over the canal; or 3d. Between the canal and the mills; or, 4th. Between the mills and the bank of Chicopee River; considering, for this purpose, the street, the canals, the mills, the land, and the entire space between the street and Chicopee River, as they were in March, 1845, when the act was passed by the legislature:

Also, if they should be of opinion that it was necessary to lay the railroad over Front Street, where it now is, whether any, and if any, what further fences, gates, barriers, guards, or other precautions are required by the act of 1846, c. 271, in order to render it safe and convenient for the general travel to pass through, over, and across that street. *Commissioners appointed accordingly.*

EQUITABLE RELIEF FROM THE DECISION OF THE ENGINEERS UNDER * CONTRACT FOR RAILWAY CONSTRUCTION.

Herrick v. Belknap's Estate and the Vermont Central Railway, 27 Vermont Reports, 673.

A stipulation in a contract for the construction, in part, of a railway, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," is binding upon the parties, and constitutes the engineer an arbitrator or umpire between them.

Such a stipulation imposes upon the party, by whom the engineers are to be employed, the duty of employing for such engineers, competent, upright, and trustworthy persons, and to see to it that they perform the service expected of them, at a proper time and in a proper manner.

Such a stipulation, when construed with reference to its subject-matter, and the ordinary course of business, does not require the estimates to be made or verified by the chief engineer, but has reference as well to the assistant or resident engineer, by whom such estimates are usually made.

If payment for the work performed is dependent upon, and to be made according to the

engineers' estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, &c., the obligation to pay will not arise until such estimates are made.

But if no estimates are made, through the neglect or fault of the engineer, or of the party who employs him, the other party could probably recover at law, for the work performed by him, without any engineer's estimate of it.

A contract providing for monthly estimates of the contractor's work, according to which he is to be paid, imports an accurate measurement and final estimate for each month, and not such a one as is merely approximate or conjectural.

A court of equity has jurisdiction of a claim to be paid for a larger amount of work, done under such a contract, than was estimated by the engineer, where the under-estimate was occasioned either by mistake or fraud.

The Vt. C. R. Co. contracted with B. for the construction of their railroad, and B. contracted with the plaintiff for the construction of a part of it. In both contracts there was such a provision in reference to the conclusiveness of the engineer's estimates. *Held*, that there was no privity of contract between the plaintiff and the Vt. C. R. Co., and that he could not recover of them for work not estimated by the engineer, by reason only of a mistake, which they had not either directly or indirectly caused or connived at; and that their indebtedness to B. for the same work for which he was indebted to the plaintiff did not constitute a fund against which the plaintiff had a claim.

But if there was any connivance on the part of the Vt. C. R. Co., or their agents in bringing about the under-estimates complained of, even if it was without the design ultimately to defraud, but only as a temporary expedient for present relief, the plaintiff would be entitled to recover of them the loss which he sustained by reason thereof.

The plaintiff claimed, in his bill, that he had been under-estimated a given amount, for the payment of which he instituted the present suit; by the report of the master, the amount not estimated was found to be more than twice that amount. *Held*, that the plaintiff should be limited to the amount claimed in his bill.

The report of a master in chancery upon the taking of an account, should contain a succinct statement of all the points made by counsel, and the facts found by him upon each point.

The testimony given *viva voce* before a master in chancery in taking an account, or a copy of it, should be returned to the court with his report.

The master should also state the account at length and all the facts found by him so that they will be intelligible without reference to the testimony.

OPINION.

REDFIELD, C. J. This being a bill brought to obtain payment for work done on the Vermont Central Railway, beyond, or aside of the estimates of the engineers; and the contract, by which the company let the work to Belknap, and also that by which he underlet a portion of it to the plaintiff, containing a provision, in these words, "and the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," the recovery can scarcely be claimed upon any other but

one of two grounds : 1, that the engineers, without the fault of the plaintiff, have failed to make an estimate within the fair import of the contract ; or, 2, that having made one, it is so erroneous as not to be binding upon the parties, under the contract.

We think there can be no question that this stipulation does bind the parties to abide the decision of the arbitrator named, as much as that of any other umpire or arbitrator. And, in one sense, the submission to the determination of the engineer is more obligatory than any ordinary submission, inasmuch as being upon consideration, it is not revocable, and the obligation upon the defendants to pay, does not, by the terms of the contract, arise, until the estimates are made by the engineers. But, this being a peculiar species of contract, so far as the umpirage is concerned, that being referred to the agents and servants of one of the contracting parties, persons in the employ, under the control, and in the pay of that party, it seems from necessary implication, to impose upon that party the obligation to employ competent, upright, trustworthy persons in this service, — and to see to it that they did this service in the proper time and in the proper manner. And these estimates, when made, are, no doubt, entitled to the common presumption in their favor, *omnia rite acta*. But, being of a nature where perfect accuracy is attainable, or nearly so, and made by a class of persons altogether in the interest and under the control of one of the contracting parties, it would impose, doubtless, some duty of watchfulness, as to the persons employed, and, also, in regard to abstaining from all attempts, mediately or immediately, at influencing them in their action in the premises. And, while it is undeniable that a full and fair decision of the engineer is as binding as any other award of an arbitrator, and practically (on account of the vast extent of the work, and the vital necessity of the company and the contractors knowing, as they go along, how they stand, and closing their accounts from time to time, beyond the necessity of revision), more emphatically entitled to exemption from re-examination, upon slight or factitious grounds. Still, it must be apparent that, in the matter of proof, the decision of such an arbitrator, when brought before a judicial tribunal for revision, as they are always liable to be, are exposed to more watchfulness and carefulness of examination upon those points where from the nature of the case, they are exposed to peculiar liability to infirmity. No fair mind, competent for such an examination, could fail to perceive this. But this surely

will not justify any court in setting aside such a determination, upon any but the most unanswerable grounds. It must be obvious to all that the parties must have felt the necessity of such an umpirage, or they would not have provided for it, — and that, having provided for it, by the express stipulations of their contract, they must now abide by it, and not expect a court of equity to relieve them from the probable consequence of their contract, however disastrous it may possibly have proved to their reasonable or unreasonable anticipations.

We think it is not the fair interpretation of this contract, that all these estimates were to be made by the chief engineer. Contracts must be construed with reference to the subject-matter, and made, as far as is consistent with the terms used, reasonable and just. One altogether unacquainted with the matter of such extensive works, from the word engineer being used, in the singular number, would, almost of necessity, conclude it must have had reference to the chief engineer alone, else the word would have been written in the plural, as applicable to the several resident or assistant engineers. But when we come to know that, practically, the chief engineer never does, and never can, make these estimates, or even verify those made by others, — that the thing is altogether impracticable, — we must conclude that the parties had reference to something which was usual, or at least possible, in such cases. And this, we find to be the estimate of the engineer having charge of the section, who is called the resident engineer. And this meets the terms of the contract, as well as by referring it exclusively to the action of the chief engineer.

We need, perhaps, spend no time upon the question, what would be the rights of the defendants, if no estimates of the plaintiff's work had been made by the company's engineer. For the plaintiff bases his claim upon no such state of facts, and he cannot expect to recover upon a case not made in his bill. If the plaintiff's work had failed to be estimated, through the fault of the engineer, or the company, or Belknap, it does not now occur to me that there would probably be any difficulty in obtaining a recovery at law.

We may here, perhaps, look into the general rules of decision in courts of equity, which must govern this case. The claim put forth in the bill, being either mistake or fraud in the estimates, is one clearly of equity cognizance. Fraud, accident, and mistake

form appropriate branches of the general jurisdiction of the court of chancery in England and in this state. So, too, as to the particular subject of awards, the ground upon which redress is here sought was originally confined exclusively to equity. The courts of law did not, until quite recently, and never as a general thing hear evidence of fraud or mistake in the arbitrator or undue influence in the prevailing party, unless it appeared upon the face of the award, either explicitly or by obvious implication. 2 Story Eq. Jur. § 1452; Bac. Ab. Tit. Arb. and Award 239; *Wills v. McCormick*, 2 Willson, 148; *Newland v. Newland*, 2 Johns. 62; *Barlow v. Todd*, 3 Johns. 367; *Bulkley v. Stewart*, 1 Day's Cases in Error, 120; *Cranston v. Kenney*, 9 Johns. 212. These citations might be carried further. But the whole subject of law and equity jurisdiction over awards is so thoroughly investigated, from the civil law, through the common law and equity laws of England, by Chancellor Kent, in *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, as to leave nothing further to be desired upon the subject, and to show very clearly that, in a case like the present, the party's only remedy is in a court of equity. Mr. Justice Story, too, devotes one entire chapter in his *Eq. Jurisp.* 2 vol. p. 913, to the subject of awards in which he comes to a similar conclusion, § 1450 *et seq.* This is sustained upon the ground of discovery, and setting aside the award, and also on the ground of fraud, accident, or mistake.

1. If the proof only establishes mistake in the engineers, but no undue influence over them by the company, and no suppression of the truth after the mistake is discovered, it would seem, upon general principles, the plaintiff cannot recover of the company, there being no such privity of contract, and no such co-operation in producing the wrong as is requisite to make them liable. It was, indeed, slightly claimed, on the hearing, that the company are liable upon the contract to Belknap for not employing proper engineers, or enough of them, at all times, as the injury fell upon the subcontractors. But the proof is but imperfect upon any such ground. This portion of the claim was put mainly at the hearing upon the ground that the company had a fund designed to go to the orator, and which he may go directly against, even without joining Belknap, it would seem, as he is now dismissed from the proceedings, or showing positive connivance of the company. Without going very much in detail into the doctrine of marshalling assets, it seems very obvious to me, that the proof in

this case, will justify no such claims, or no claim upon this first ground against the company. The company hold no specific fund against which the orator would have any claim upon the ground that, by mistake, the engineers had failed fully and correctly to estimate his work, and of Belknap's insolvency, any more than he would have upon the mere ground of Belknap being indebted to him, and the company to Belknap, and Belknap insolvent. And it is familiar law that this is no ground of sustaining a bill in equity.

The creditors of an estate could not maintain a bill against the debtors of the estate, upon the mere ground of the indebtedness and insolvency, and this case viewed as a claim for mistake in the estimates merely is nothing more. This is too familiar law to require debate or authority, which latter is indeed abundant. We may illustrate this by reference to the mistake of ten feet in the height of a bench on one of these points of excavation, which must have affected very essentially the proximate estimate, and which does not appear very satisfactorily to my mind to have been properly corrected, and which if it affected the monthly estimates to the same extent, would surely be such a mistake in the decision of the engineers as a court of equity would correct and give a remedy against Belknap for, so far as it was clearly shown to have lessened the amount allowed. But although this same decree of the court of equity might lay the foundation for a recovery by Belknap against the company, it would not enable the plaintiff to go directly against the company.

2. But if the proof establishes connivance on the part of the company or their agents in bringing about under-estimates (whether with the motive of ultimately making full estimates, and thus only obtaining relief in a moment of pressure, or of defrauding the contractors, and thus making a saving to themselves, is not essential, so far as the remedy directly against the company is concerned), the plaintiff is confessedly entitled to a decree against them and their accomplices, for the loss thereby sustained. And he may probably claim a similar decree against Belknap, whether, as to him, the proof establishes fraud or only palpable error in the estimates, as the bill against him goes upon both grounds, and he is bound by express contract to have the work properly estimated by competent engineers. But it is questionable how far the contract of the company with Belknap enures to the benefit of subcontractors,

even as to the engineers. There is no more privity there than in the other portions of the contract. There could be no subcontract without the consent of the company. But this, if fairly implied in this case, created no privity between the company and plaintiff.

But the bill against the company makes no claim upon the mere ground of Belknap's death and insolvency, and the company's indebtedness for the same work to Belknap. All that portion of the agreement is then effectually disposed of by there being no such claim in the bill, as well as by its untenableness. But the bill claims to recover of the company for the "new road;" for the removing of the loose stone left in the pit by Barker & Haight; and for building the blind culvert, upon the ground that this was work not within the contract with Belknap and done by direction of the company's engineers. This claim as against the company seems precisely like that made in *Thayer v. Vt. Co. R. Co.*, 24 Vt. 440, and that decision is entirely satisfactory to the court, as applicable to the facts, in this case. There is not, in the evidence, the remotest probability that the plaintiff ever supposed he was doing this work on the credit of the company, and it is certain he had no just reason to suppose so. All the contracts in relation to this section expressly require that claims for extra work shall be supported by written orders from the engineer, and be immediately presented for allowance. The plaintiff took no steps to perfect any such claim against Belknap, and there is not one particle of evidence to show that, at the time the work was done, he ever expected to make any claim for it directly against the company. We must conclude, then, that he did expect to have it estimated in the common course of allowance against Belknap, as most of it seems to have been, at something. The road on slip hill was so estimated, and the blind culvert; but it is said this was attached to a prior estimate, which had been paid. But if attached there, it seems to me, the engineer, on the most charitable construction, might fairly be presumed to calculate that it would be taken into the final account of all estimates to plaintiff, and is not necessarily chargeable with fraud in doing it. Possibly, perhaps probably, the loose stone may not have been estimated to any one. They could not properly be estimated to Barker & Haight till removed, and, when removed by plaintiff, he should probably have had pay from some one what it was worth, but if they had failed to be estimated, through the fault of the en-

gineers, we do not, as was said before, see any objection to a recovery at law against Belknap, if anywhere. If it were to be regarded as the extra work which it is claimed to have been, both in the bill and in the argument, it is not very obvious how Belknap could recover for it of the company, or the plaintiff of Belknap. The only possible mode of reconciling such a recovery with the contracts would be, as the supplemental bill attempts to do, to allow a claim directly in favor of the plaintiff against the company, between which parties there was no written contract to embarrass the matter. We have said all we need upon this view. The objection here is, that there not only is no written contract between the parties, but no contract of any kind, either express or implied.

The supplemental bill further claims that the company shall be liable for all plaintiff's loss by under-estimates, by reason of their connivance and collusion with Belknap and the engineers, in inducing such under-estimates, and, also, on the ground of employing incompetent and unfaithful engineers, which seems valid if proved.

The plaintiff's claim, then, is narrowed down to 44,416 yards of earth excavation at ten cents, and 608 yards rock at eighty cents, and if this is made out upon the ground alleged, it might fairly entitle the party to recover for the amount reserved upon the estimates, already paid for, by way of damages, if the court should be satisfied that the plaintiff was compelled to abandon the contract, in consequence of these fraudulent under-estimates. The right to recover to this extent must depend upon the evidence. There seems to be no other just impediment remaining as to this portion of the claim. This inquiry, naturally and legally, becomes twofold. 1. Is there proof in the case, aside of the report of the masters and the evidence before them, to justify the reference?

In regard to referring a case to masters, the chancellor undoubtedly exercises, to a considerable extent, a discretion where the proofs are attended with embarrassing doubts. In such cases, no doubt, a reference is often made, and justly too, with a view to relieve the mind of the chancellor upon a particular point. An issue is often sent to a court of law to be tried by a jury, for the same or similar reasons. But in a case like the present, where the court are asked to set aside a contract and virtually to reform it on the ground of mistake (I refer of course to the award, which is virtually but the consummation of a contract between the parties), the case could

not properly proceed to the reference, unless the court were very satisfactorily convinced of the mistake in the first instance. And the same rule would apply where the court were solicited to set aside a contract on the ground of fraud. The extent of the remedy would be governed exclusively or chiefly by the finding of the masters under such restrictions as the court might impose. But the mode of proceeding before the masters is exclusively under the control of the court. And, in a case like the present, they might require the masters to proceed in finding the deficiency in the estimates exclusively upon the principles of exact admeasurement, if they judged it more conducive to justice. The report of the masters, in the present case, does not possess any thing more than an approximation to accuracy. And approximations are of almost all conceivable degrees of nearness, and still claiming the same generic name.

But upon the very point of the testimony being sufficient to justify a reference to the master, it seems to me, rather difficult to resist the conviction in the mind that the estimates made by the engineers, did not come up to the contract or the truth. The stipulation in plaintiff's contract with Belknap is that "payments shall be made monthly of three-fourths the amount of the engineer's estimate of work done," referring very obviously to the monthly estimates stipulated for in the company's contract with Belknap, for the kind of estimate and the manner of being made. By referring to this contract, it seems to me, that it can fairly be understood only as importing a conclusive estimate monthly. There is certainly nothing in the contract, and nothing in the character of the subject-matter shown or known to us, that would lead any one to expect that any more accurate estimate was to be made one time than another. This seems to have been an arrangement for the convenience of the engineers chiefly. And if attended with no embarrassment or consequent loss to the plaintiff, I could not feel justified in interfering with the estimates, on that account merely. But, as it seems to me, to be a departure from the contract, by which no definitive estimates were made, except at intervals of some number of months, and by the mere act of engineers, as it seems to me, or possibly by connivance of the officers of the company, if any ultimate loss occurred to plaintiff by reason of this departure from the contract, it would seem it should fall upon those who were responsible for this deviation from the course prescribed in the contract.

It might be of some importance whether these estimates are considered to import merely the judgment of the engineer, upon the amount of work done, or an accurate measurement. But, from the known practice in such matters, there seems no good ground to question that the estimates stipulated for were strictly mathematical admeasurements. This being so, it is obvious to remark, that mistakes and under-estimates could be more readily ascertained, and more satisfactorily proved, and that the more frequently such estimates were made, the more accurately could the exact amount of excavation be known. If the final estimates were to be deferred till the work were completed, or nearly so, it must, from the very difficulty of knowing the form of the surface on slopes, be far more inaccurate than the original proximate estimates. In looking into the estimates made for plaintiff after the 24th of March, the very form of the estimates, being in round numbers, shows, that for every month, except June and October, the estimates were nothing more than a mere arbitrary judgment, or conjecture, what we call, in popular language, a rough guess. The estimates then for April, May, July, August, and September could not be regarded as any such estimates as the plaintiff's contract required. But, being made and returned, they might require to be set aside, in a court of equity, to enable the plaintiff to recover for any deficiencies in them. And we may suppose that such rough conjectural estimates would be liable to be very much swayed by the slightest influence, either of the company or Belknap, and especially the former. And the June and October estimates being claimed to be final, this is claiming them all to be final.

And, in looking into the testimony in regard to these estimates, there is certainly a great deal which looks as if the necessities of the company induced them to connive at very inadequate estimates. It is scarcely possible that, if the company desired to produce any such result with the class of men they had to deal with, and their relation to them, they should not have been able to effect their purpose.

All the testimony goes to show that, during the whole time, the company were pressed to the very verge of bankruptcy; and its officers, men of the most tried and chivalrous honor and integrity, to save the utter failure of one of the most cherished enterprises, felt compelled to drive the contractors off the road, north-west of Montpelier, unless upon particular points, requiring much time for

their accomplishment. And although the plaintiff's job was one of these points, yet, in one instance certainly, the president of the company did resort to an evasion with the plaintiff, which, if he had not bought off, must have put an end to his operations, and which was so expressly in violation of the company's contract of letting with Belknap, by which they promised to assure the right of way, and so much in conflict with the general course of conduct of that high-minded man that when, in his testimony, he was inquired of in regard to it, he unhesitatingly disclaimed the transaction, as something which he could not have done, "because he had no right to do it!" And still the fact is shown under his own hand, in regard to which there is, of course, no chance of error. And the president of the road told George W. Barker that Belknap would not wish to pay the hands, on that part of the road, long after the estimates were stopped. Some other witnesses testify to similar statements of Gov. Paine; Loomis Palmer for one, to his showing sensitiveness that the work was not discontinued towards Burlington. Some expressions of Paine (as to Phinney) show that he was willing to hold out that, if Belknap persisted in doing work on that end of the road, the contractors would not get more than enough estimated "to pay the shovellers." I do not say how reliable this testimony is. The witness was not before us. But of Barker's testimony there can be no doubt, or Palmer's, or Paine's letter, or of the general course of Paine's talk, about this date, that money was so short that the work could not go on at the end of the road, and if worst came to worst, the estimates *must be reduced* to the *starving point*, and finally withdrawn altogether. It was only Paine's interference, and Beckwith's letter to Collins, which could raise the June estimates, in the words of the letter "to about the full amount of his estimate!" I do not find the letter among the exhibits, but such proof came out in the case somewhere.

It may be questionable how far this will justify a court in concluding that Gov. Paine, as president of the defendants' company, had formed any deliberate purpose of defrauding the contractors. Knowing as much, as I think I did, of the man, it would produce no such effect upon my mind. And I could not justify it to my sense of justice, to find a fact, which I would not dare to say, in view of any present or future accountability, I believed; or which I should hesitate to state if the man were alive. But if the testimony clearly established a deficiency in the estimates to the orator,

and I think that must be regarded as pretty satisfactorily made out, in various modes, I should conclude such talk of Paine had an influence upon the subordinates of the company even beyond what it was intended to have. And I am inclined to think Paine desired to have the estimates kept down to the very lowest possible point, during that severe pressure, and especially on that portion of the road. And such talk could not fail to be made known to the engineers, and with men of moderate capacity, and only a common share of firmness, it is impossible to conjecture how much the knowledge of such a desire, in a superior, who held the very means of their daily subsistence in his will and control, would be likely to influence their estimates, especially, when made by mere guess, as it is evident most of these were.

It seems to me that the knowledge of such a desire, in the controlling power of the company, must have had a very marked influence upon the monthly estimates, where they were at all subject to variation, and that it might influence even those made from actual measurement.

Another proposition, which seems to me fully established, is, that the estimates do come very considerably below the proximate estimates on section eleven of the second division, allowing for slides which went into the river, and for those which had to be removed again. And these latter, it seems, the engineers treated as properly to be estimated to the contractor. All agree that the proximate estimates were ordinarily too low, and that one mistake in the proximate estimates, now acknowledged by all, did affect them in one cut to a very considerable extent, so that the conclusion seems almost inevitable that there have been under-estimates, on that section, to the contractors; and the testimony seems to me to show that it more probably happened, in these estimates, by Collins, to this orator, than at any other point, so that I feel reasonably satisfied that they did happen here to some extent. I should therefore refer the matter to some tribunal to estimate the deficiencies. And if the chief officer and agent of the company, willingly produced this, to some extent, although, as I believe, intending that ultimately every cent should be paid, on full estimates to all the contractors or subcontractors, I must still conclude that the company were responsible for this deficiency in the estimates, if it happened never to be made up, as this never was and never could be, if Kennedy's testimony is reliable in regard to this matter, and it seems

to me it is. For all the testimony, and the conduct of the officers of the company, goes to satisfy me, that this work of estimating monthly to plaintiffs was done in the lowest manner, and never at all in conformity to any just construction of the contract, but still probably in such a manner as to embarrass a recovery at law. And Paine's appeal to Belknap and the engineers to give larger estimates, or full estimates to plaintiff, just before the June estimate, is altogether satisfactory to my mind to show, that they all understood that their estimates were mere approximations, and quite under the control of the engineers and officers of the company and Belknap, and that in this way they could strangle any man they chose. Paine's talk shows this. And in this connection Collins's slang "of plaintiff's dying off when frosty nights came," and its literal fulfilment, are, to say the least, striking coincidences. This building railroads of such vast expense, with no adequate means, is desperate business, and I do not think we should be surprised to find desperate efforts and desperate expedients resorted to by the best of men, whose very lives and all earthly hopes stand upon the event of their success or failure. I feel that my judgment upon this testimony is charitable, but that it is truthful. But, even with such proof, I could not feel justified in allowing a court of equity to interfere to correct estimates, which at the time were acquiesced in by the contractors. The necessity of having such vast undertakings closed, as the contract specifies, and as all reason requires, would induce me not to interfere, unless complaint was made at the time.

This determination is here supported, too, by the plaintiff's complaints at the time. But when I look into the report of the masters, it may be the nearest approach to truth, which can now be attained, but it seems to me a most extravagant finding, so extravagant that it has at times staggered me in regard to the whole case, and half led me to conclude we should run the least hazard of being absurdly imposed upon, by dismissing the bill, and saying to the plaintiff, if he could not make a clearer and more rational case, he must not expect the estimates to be set aside. And the immense difference in the estimates of engineers, and in the results of the different modes of approximation, shows that there is no great certainty in this kind of proof. But the claim in the bill will limit the matter to one-half the amount allowed by the masters, and I cannot but believe, from all the testimony and attendant circum-

stances, that this is twice as much as the real deficiency could have been. I cannot believe any contractor, of half common sense, would submit, for a single month, to half estimates; the very supposition is absurd! And then, even after this bill is brought, the orator himself swears in his affidavit, which is part of the case, and which the court may look into, therefore "I believe I have a just claim, &c., of about \$4,000," and finally obtains a decree for more than twice that amount, nearly three times. It is obvious to remark that such a suitor certainly was late in discovering the extent of his injury.

In regard to Belknap's liability, no further discussion is necessary inasmuch as his contract with plaintiff must be regarded as binding him to see that the work was properly estimated. It would be absurd to suppose that the plaintiff would have bound himself to abide any other estimates. And as he could not look to the company for this, having no contract with them, he must rely upon Belknap, if any one. And Belknap's contract with the subcontractors must be regarded as a virtual indorsement of the same stipulations which he had with the company, to such contractors, or, more properly, a renewal of such stipulations, as he could not indorse those of the company.

This will render Belknap liable on his contract for the mistakes in the estimates, and, as the bill sufficiently charges that, there is no need of looking into the question of his knowledge of the estimates being too low as they progressed, and virtually conniving at it, for the present, on account of the pressure and difficulty of obtaining funds. The testimony of Scott, the clerk of Belknap, which seems to me very reliable, certainly shows that Belknap claimed always a very considerable under-estimate in the work, as a whole, and that there was no pretence of his owing the company till after his death. And, had he lived, there is, in my judgment, little doubt the balance would have resulted very largely the other way.

It seems to me, therefore, that some kind of reference to the masters of the court of chancery was justified by the state of proof in the case. But as the reference was made before the case was heard in the court of chancery, and very likely before the counsel knew much of the detail of the testimony, it went to the masters in a very loose and unsatisfactory manner. And going into the case in this loose manner, and having kept no record of their proceedings, and the testimony given before them, and made no state-

ment of the facts proved before them, or found by them, it is perhaps no matter of surprise that the result to which they came, has but little applicability to the case, as it stood in court. But for that or some other reason their report seems to us altogether unsatisfactory. And, although at first I was inclined to patch it up, and let it stand for some \$4,000, a critical examination of the case with reference to the authority, satisfied me it could not be supported to any extent.

I. It is altogether deficient in form. According to the English practice it contains almost none of the requirements of a master's report in chancery.

1. It should contain a succinct statement of all the points made by counsel and of the facts found upon each point. This, in the English practice, is submitted to counsel, after being drawn up by the masters, at a meeting for settling the form of the report and noting all exceptions on either side. But in our practice, this formal hearing before the masters is dispensed with, and the exceptions filed to the report, after it comes into court. But the facts found by the masters, not the general sweeping results, but sufficient of the details to show the ground of their decision, must be stated. This is altogether omitted in the present case. And the omission seems the more inexcusable, as the defendant's counsel left in their brief (used before the masters, and which came before this court, and which is elaborate and specific) particular requests to report, in detail, upon the process, which they should adopt in coming to their conclusion. Both upon the ground of the general rule of law, applicable to masters' reports in chancery then, and of the specific request, this omission seems to us fatal to the report. And the omission seems to us altogether inexcusable inasmuch as it was so importunately demanded, both by the counsel, and the nature of the case. It is this consideration, among others, and chiefly that the proceedings are of no avail in the case, as they might have been, if the masters had pursued the usual and prescribed course, which has induced this court to strike the master's fees out of the bill of cost.

2. The masters have wholly omitted to report the testimony given before them. This, according to the English practice, is always required. It is not done as part of the report, but in separate forms, and filed in the proper office, to enable the court to revise the finding of the masters, if it is desired on any account.

The rule is in these words, Order 69 of 1828, which is the earliest English order allowing the *viva voce* examination of witnesses before the masters, in taking an account, "The master shall have power, at his discretion, to examine any witness *viva voce*, and the testimony upon such *viva voce* examination shall be taken down by the master, &c., and preserved that the same may be used by the court, if necessary." 2 Daniels Ch. Pr. 1387. This seems to us another fatal omission, in the report, and, one which, in a case like the present, renders the report of no value in the case. And, although no request was made upon this point, and a loose practice may have prevailed in some parts of the state, it is no sufficient excuse for the omission. It is understood by the masters in some counties, and should be in all, that a copy of the *viva voce* testimony given before them, in taking the account, must be returned. If a report in the form of the present one, and in spite of the requests and remonstrances of the party, on either side, as the case may be, is to stand, it is the master, and not the court, who tries the case. For as this case now stands, if the master's report is to be upheld, it must be admitted that the hearing before the chancellor, or in this court, is of very slight avail. It is of none the slightest consequence except upon the mere question of reference to the master. That being determined, the question whether the plaintiff shall recover one hundred or ten thousand dollars, is not subject to any revision whatever. This is not the true theory of a court of chancery. The chancellor in the first instance, and this court, upon appeal, must revise, if need be, the whole hearing before the master. It must, at all events, be in a shape in which this can be done. 2 Daniels, Ch. Pr. 1475-1490 and note.

We ought, to prevent misapprehension, here to say, perhaps, that this rule will not excuse the master in doing what Lord *Eldon* calls emptying his wallet upon the shoulders of the court. He is still bound to state the account, at length, and all the facts found by him, so as to be intelligible without reference to the testimony. This is what Ch. Justice *Williams* is insisting upon in the case referred to in the argument.

II. But the report, itself, as far as we can comprehend the basis upon which it proceeds, is quite unsatisfactory to us.

1. It is more than twice as large as the amount claimed in the bill, and almost three times as much as the sum sworn to be due

by the plaintiff in the outset, and to us it seems fair to conclude that, in the outset, the plaintiff himself would be likely to estimate his injury quite high enough, and if he is so unfortunate as not to do this, he ought to be content to lose the excess, as a just penalty for his excessive modesty or his uncommon stupidity.

2. Some of the details of the report seem to us equally incomprehensible. The plaintiff is allowed by the masters more than four times the amount of rock excavation which the engineers of the company estimated to him. This is done in a through cut, where there is no difficulty whatever in a common mason or teamster coming readily to a very near approximation of the actual excavation made from time to time. And to suppose that, when the pay was so considerable for this work, and the importance proportionably great, any engineer should dream of satisfying a contractor with less than one-fourth his just due, is making him more simple than any testimony in the case will justify. I think it equally difficult to believe that the plaintiff could possibly have been pacified with any estimate one-half as wild as this. The truth undoubtedly is that no such absurd estimates were ever made. For if the engineers had desired to depress the estimates, as they did, I think they would sooner do it anywhere else than here. And we do not learn either from the bill or the testimony that any great complaint was made, at the time, in regard to the estimate of rock excavation. Even at the time the suit was brought it seems to have attracted very little attention. It is only mentioned incidentally in the bill.

3. The slide of ten thousand feet of earth into the river, which is allowed by the masters at one thousand dollars, as earth excavation, seems to me manifestly not to come within any just idea of excavation under the contract. It does not seem to have been the result of any art or contrivance like bringing a stream of water to bear upon the bank, which has been treated as a legitimate mode of excavation under similar contracts. But this slide and others at this point, were altogether accidental and neither expected nor desired. Neither did they come within the range of what was originally intended as the bed of the road.

This slide and numerous others, near the same point, resulted from the breaking away of the bank, from time to time, which rendered it necessary to carry the bed of the road further back into the hills. At the price agreed to be paid for earth excavation,

these slides, at this point, would, in all, amount probably to nearly \$10,000. And where they fell into the road-bed, and were required to be again removed, the engineers uniformly estimated the removal. But where they fell at once into the river, from a point not originally, or until the convulsion, intended to have been excavated, there seems no more reason why they should be estimated as excavation, under the contract, than if the whole hill, from its very base, had been at once removed, by an earthquake or a volcano. It seems to us the engineers did right in rejecting this claim. And, right or wrong, their decision, if fairly made, is conclusive upon the parties.

I have been somewhat staggered, in regard to the reliableness of the investigation of the masters, in this case, in finding that its results seem to be little more than an indorsement of the plaintiff's exhibit of December 28th, 1850, referred to in the deposition of Walter Forsythe, for, I think the coincidence could not have been altogether accidental. This exhibit is nothing more than a comparison of the labor, under the written contract, with the results of the work done by the same plaintiff, under a prior verbal contract, as allowed in the engineer's estimates. And it is obvious, at the first glance, that such a mode of estimating, is nothing but a mere basis of conjecture. It is perhaps better than nothing. But when its results give the plaintiff twice or three times as much as he ever claimed, at the time of the transaction, it should lead every practical man to suppose that they are wide of the truth. And it would seem that so much labor, as the masters seemed to have performed in the case, should have produced something more satisfactory than a mere arithmetical calculation, in simple proportion, which any one could institute in twenty minutes.

THE RIGHT TO RECOVER, AS UPON A QUANTUM MERUIT, FOR WORK DONE AND MATERIALS FURNISHED ON A RAILWAY; BUT NOT STRICTLY IN COMPLIANCE WITH ALL THE TERMS OF THE SPECIAL CONTRACT.

Merrill et al. v. Ithaca and Owego Railway, 16 *Wendell's Reports*, 586.

Where work done under a special contract is not completed within the time limited for its performance, but is progressed in after the day, with the assent of the party for whom the work is done, a recovery may be had under the common counts for the work done; but the plaintiff is confined to the rate of compensation fixed by the contract, whether one party or the other be the innocent cause of the delay, where there is no intimation during the progress of the work of an intention to demand a different rate of compensation.

But where the delay is caused by the wilful acts or omissions of the party for whom the work is done, originating in a premeditated design to embarrass and throw obstacles in the way of performance by the other party, who, notwithstanding, proceeds and bestows his time and labor in attempting the completion of the job, until in despair he finally abandons the work, the rule that the special contract must control as to the rate of compensation no longer prevails, and the party is entitled to recover under a *quantum meruit*.

A party who has performed labor for another, cannot, in an action to recover for such work, produce in evidence check-rolls, or accounts of the number of days' work performed by those in his employment, for the purpose of fixing the amount of labor done, without verifying the same by the oath of the agent who made the entries, or kept the accounts, if such agent be living.

If the agent be dead at the time of the trial, original entries made by him in the usual course of business may be produced in evidence; but the mere fact that he is absent from the state, so as to be beyond the reach of the process of the court, will not entitle the party to give such entries in evidence.

When original entries are produced, and the person who made them, or saw them made by another, knowing them at the time to be true, testified that he made the entries or saw them made, and that he believes them to be true, although, at the time of his testifying, he has no recollection of the facts set forth in the entries, such evidence is admissible and *prima facie* sufficient to establish the facts evidenced by the entries. Such proof, however, it seems, will not be received, where only a copy of the original entries is produced.

Charges for services done or property delivered under the supposed existence of a special contract, but which afterwards become matter of account by operation of law in consequence of a rescission of the contract, cannot be proved by the party's book; there must be a right to charge when the service is done or the goods delivered.

When and under what circumstances original entries or memoranda may be received in evidence, considered; and many cases on the subject collected and commented upon.

THIS was an action of assumpsit, for work, labor, and services, and materials found in the construction of a part of the railway of the defendants. The declaration contained only the common

counts. The cause was heard before referees, who allowed the plaintiffs, under the *quantum meruit* count, to give evidence of the quantity of work done, and of its value ; notwithstanding that the defendants produced in evidence contracts in writing, signed and sealed by the parties, specifying the work to be done, the mode in which it should be done, the prices to be paid for it, and the manner in which the amount to be received by the defendants should be ascertained ; and proved that the work was done under such contracts, that the amounts due were periodically ascertained in the manner prescribed by the contracts, and paid to the plaintiffs. According to the terms of the contracts, the plaintiffs would have been entitled to recover about \$2,000 beyond the payments made to them during the progress of the work, instead of which sum the referees made a report in favor of the plaintiffs for \$12,125.08 ; which report the defendants now move to set aside. The contracts were entered into on the 4th February, 1832, by which the plaintiffs stipulated that a portion of the work should be completed on or before 15th July, 1832, and the residue on or before 15th September, 1832. The plaintiffs commenced the work, which, when the time limited for its completion arrived, was not finished. The plaintiffs, however, continued to labor upon the job, and the defendants, from time to time, made payments to them according to estimates made and certificates given by the engineer of the company, in pursuance of the stipulations of the contracts. The plaintiffs continued to labor on the road until May, 1833, when they abandoned the whole work, having in the previous month of January abandoned a particular section on which they had labored up to that time. It seems that the plaintiffs, under the direction of the engineer, worked upon sections of the road not embraced in the written contracts, but the whole work was done, estimates made, and payments received, as if the whole were embraced in the sealed contracts. On the part of the plaintiffs a mass of testimony was exhibited, to show not only that they had been greatly hindered in the progress of the work, by the neglect of the defendants, in not employing a sufficient number of engineers to lay out the work, make estimates, &c., but that there had been a systematic course of proceeding on the part of the defendants to throw obstacles in the way of the completion of the job, by means of which the plaintiffs had been greatly damaged. The plaintiffs, for these reasons, insisted that they were not bound by the terms of the contracts, as to the measure of compen-

sation to be made to them for the work bestowed, but were entitled to recover, under the *quantum meruit* count, what they should prove the work to be worth. This position was conceded to them by the referees, and the plaintiffs accordingly gave in evidence the species of proof stated in the opinion delivered by Mr. Justice *Cowen*, and for the receiving of which, in the manner in which it appeared before the referees, the report is set aside.

OPINION.

COWEN, J. After such an exact tacit adherence, on the side of the plaintiffs, as appears from the evidence in this case, to the written terms of the contracts, without one word that they intended to alter their rates of charge, it would be a fraud upon the company were they allowed to change their ground. It is not denied that they may resort to the general counts. Both parties having assented that the work should go forward after the day, that may be so. It is clearly so as to line C. and section 4, if they are not touched by the general provisions of the contract in respect to section 3; yet the rule is well settled, that though there be a deviation, yet the special contract shall be pursued as far as it can be traced and made to apply. Here all the powers of the engineer-in-chief, with the measures and estimates, may be retained and applied to the whole work, with very little exception. For a plain excess beyond what the parties may have treated as within the articles, there could of course be no objection to allow on the basis of a *quantum meruit*. I am here speaking particularly of the work done on sections 3 and 4. As to section 8, there is no doubt that all the substantial provisions of the written contract should be applied. The prices and estimates of the engineer-in-chief would still be conclusive, though we should allow the action of *indebitatus assumpsit*. It is a mere change of remedy. It would be gross injustice to allow any substantial departure from stipulations, in reference to which the parties all along acted. No matter for the delay, and no matter which party was so unfortunate as to be the innocent occasion of it. It was the business of either to speak out, if a change of terms was in contemplation. Silence was equivalent to saying, "I go on upon the old terms." It is like a tenant holding over in silence. He shall pay his last year's rent. If one party, by his conduct or silence, leads another to believe that he is at work for him on certain

wages, he is estopped and shall not add to his demand. I forbear, however, to pursue this branch of the inquiry. I have said so much merely by way of protest against the notion that, because the law is favorable to a remedy in some form, though the covenant may not have been literally fulfilled, it is yet not sedulous to save all the terms of the written contract as far as possible ; measures, proportions, prices, bases of estimate, quality of the work, every thing fair and honest.

I have so far supposed all delay and embarrassment to have been the result of misfortune ; of oversight, miscalculation, or want of forecast in one party or the other, or both ; want of skill, if you please, in the conduct of business, and I care not on which side. But there is another view of the case which is decisive in favor of a departure from the original principles and mode of estimate, at the election of the plaintiffs. [Mr. Justice *Cowen* here reviewed the testimony which had been given in reference to embarrassments to the completion of the job, alleged to have been thrown in the way of the plaintiffs by the defendants, and then proceeds.] I do not say the referees were bound to believe that here was a project by the defendants to abuse the great power confided to them, or to their engineer, by turning it into a means of ruinous delay. It is only necessary to see from the testimony, both direct and circumstantial, as it comes from many witnesses, that they were justified in such a conclusion. There was certainly a conflict of evidence upon the question ; but that belonged to the referees. Coming to that conclusion, whose fault is it that this contract was not fulfilled by the 15th of July ? Whose fault is it that these plaintiffs passed their summer in a state of tantalizing suspense, and were driven with this large concern on their hands into the ensuing winter ? Whose fault is it that a contract, which the engineer thinks performed with adequate skill, would have been profitable on the original estimates, has nearly doubled in the expense of performance ? Thus hoodwinked, and led into a train of additional expense which would exhaust two ordinary fortunes ; pursuing a pilgrimage of toil in the service of these defendants, which, with an honest and hearty concurrence on their part, might have been finished before the inclement season came, the parties stand clear of the covenant in all its features ; and the plaintiffs are entitled to an indemnity upon the principles adopted by the referees. They might have stopped, and sued the defendants for a breach of their

covenant. But going on under the circumstances disclosed, there is nothing of the primary principles of estimate which could have been justly applied.

I apprehend, however, that the cause must go back to the referees and be reheard, for an error committed by them in the admission of the kind of evidence by which they appear to have governed themselves in fixing the amount of labor. Finding that the estimates of the engineer-in-chief had become entirely inapplicable and positively unjust, by the baffling of the defendants and delays of the work till the very worst season, it became necessary for the plaintiffs to communicate to the referees, by some other evidence, the amount of labor; and they chose to adopt, as they had a right to do, the number of days in team and other work. For the purpose of ascertaining the days of work performed as between themselves and their laborers, their superintendents were directed to keep what were called check-rolls, and which appear to have been books marked A, B, C, &c., devoted to each section, in which the laborer's name was placed in the left margin; and in a column opposite, and under the day of the week at the top of that column, was written in figures the time he worked on that day. At evening when the laborers came in, the superintendents of the particular section being generally together, the rolls of names were called, and the amount of labor reported and marked by some one. The particular superintendent of each squadron of laborers heard the names, and generally either wrote the time or saw it set down, and was capable of deciding to his own satisfaction whether the item was correct. I say generally. These persons, as far as they were called to prove the rolls, did not pretend that the superintendents were always together, that they always wrote or saw written the accounts of their particular squadron, or always heard the names. Some of them were absent for days and even months; and a considerable portion of these entries must have been made without their actual or potential knowledge. One says he was sick a part of the time, and could not be out with his hands. He, however, saw or superintended the entries at his quarters in the evening. It does not appear that all the superintendents were sworn before the books were offered, much less all those persons who acted as clerks, and those who were engaged as substitutes during the absence or sickness of the general superintendents. Nor were all the clerks or superintendents, or their substitutes named in evidence

and absences accounted for. Indeed, the contrary appears, or is plainly inferrible from the case as made out by the affidavit of the attorney for the plaintiffs, into which I have so far looked, because it was adopted as containing the more correct statement of the oral evidence, the case not having been referred to and settled by the referees. The books, of course, continued in the hands or under the control of the plaintiffs. The superintendents sworn, expressed a strong general belief of the accuracy of the rolls. Several of them said settlements had been made by their particular rolls, and they always proved to be correct. They remembered names and other circumstances connected with the books, which confirmed them.

Such was substantially the account of these check-rolls when they were offered to, and indiscriminately received, by the referees; and by what I collect from the case, formed about the only guide in fixing the amount of labor. The affidavit of the defendants' counsel says: "The plaintiffs offered the check-roll books in evidence, to prove the amount of labor performed, which was objected to by the defendants' counsel, but admitted by the referees." The answering affidavit of the attorney for the plaintiffs says, that "No objection was made by the defendants' counsel, either to the competency or sufficiency of the proof of the plaintiffs' check-rolls, showing the amount of labor done by them on the railroad." This is true according to the affidavit of the defendants' counsel. He does not state that he made difficulty as to the proof of the plaintiffs' check-rolls. In fairness of construction, the defendants' objection was, that though the rolls were well enough proved and identified, yet, still they were not competent evidence for the purpose for which they were offered. I at first thought the opposing affidavit was disingenuous and evasive. Such a bad moral aspect may be removed by supposing that it intended to raise the question, whether the objection was sufficiently specific. It might have been more so. It might have said, "You have not rendered a sufficient account of these memoranda to make them evidence. You should have called everybody concerned in making them up, or account for the absence of those persons by showing that they were dead, or at least beyond the reach of process. We object to the rolls as incompetent, but not to the proof of them." The admissibility of the rolls, however, as showing the amount, we shall see depended on certain preliminary extrinsic proof. The whole offer was objected to upon the state of facts; upon the account of these check-rolls,

as derived from a number of superintendents who had been sworn in order to make the proof full for their admission. Yet, says the defendants' counsel, "we object to the offer." Looking to the course that was pursued, I fear it would be hypercritical to say that the objection did not signify a want of the proper preliminaries. I have already adverted, in a general way, to the proof of these. Among the superintendents, six were sworn, and called on to give an account of the check-rolls in order to their being offered. The affidavit for the defendants represents one of them as stating that the entries of work were generally made by one of the plaintiffs; and this is not contradicted by the affidavit of the plaintiffs' attorney. On the whole, the attention both of referees and counsel must have been turned to the question whether the preliminary proof was sufficient to warrant the offer of the rolls in evidence.

Were these rolls evidence? They were doubtless as nearly safe as was necessary for business purposes at the time; perhaps as producing strong moral conviction on the minds of men under any circumstances. But are such memoranda to be received in evidence in our courts of justice? They would have been legally admissible as books of account between the plaintiffs and their workmen; for they were adopted as the books of both, and kept open for the inspection of each. They are like partners' books between themselves. *Heart v. Corning*, 3 Paige, 566; *Fletcher v. Pollard*, 2 Hen. & Munf. 544, 549, 550; *Brickhouse v. Hunter*, 4 id. 363; *Jordan v. White*, 4 Martin, La. (N. S.) 335, 339; *Reno v. Crane*, 2 Blackf. 217. The superintendents or others making the entries, were agents for both parties. *Union Bank v. Knapp*, 3 Pick. 96, 108. But not so as to the defendants. They were not admissible as books of account kept by one dealer with another; first, because the plaintiffs had clerks and other witnesses of the labor. *Vosburgh v. Thayer*, 12 Johns. 461; *Kenedy v. Fairman*, 1 Hayw. 458; *Whitfield v. Walk*, 2 id. 24; *Sterritt's Executors v. Bull*, 1 Binn. 224. Secondly: They were not the general books of daily account of the plaintiffs; and there was no trust implied that they should keep these accounts for the defendants. *Vosburgh v. Thayer*, 12 Johns. 461; *Lynch v. Hugo*, 1 Bay, 33; *Prince v. Smith*, 4 Mass. 455; *Hough v. Doyle*, 4 Rawle, 291; Per *Kirkpatrick*, C. J., in *Wilson v. Wilson*, 1 Halst. 94; *Thompson v. M'Kelvey*, 13 Serg. & Rawle, 126; *Swing v. Sparks*, 2 Halst. 59; Per *Duncan, J.*, in *Curran v. Crawford*, 4 Serg. & Rawle, 5; *Sterrett v.*

Bull, 1 Binn. 237. Thirdly: It is not a simple case of charge for services done on a *quantum meruit*, known and recognized as such by both parties at the time. Charges for any thing done or delivered under a supposed special contract, but which afterwards become matter of account by operation of law, in consequence of a rescission of the contract, cannot be proved by the party's book. There must be a right to charge when the service is done, or the goods delivered. *Bradley v. Goodyear*, 1 Day, 104; *Slasson v. Davis*, 1 Aik. 73, 74; *Peck v. Jones*, Kirby, 289; *Terrill v. Beecher*, 9 Conn. 344. Nor does the case come within the rule allowing a banker's book in evidence, kept by many clerks, only one being sworn to identify it, and to show the manner of its being kept. This was allowed in *Furness v. Cope*, 5 Bing. 114; s. c. 2 Moore & Payne, 197. Such a book, so proved, was received to show that a customer of a bank had no funds there. But the banker was not a party; it was the bank ledger of a house which stood indifferent between the parties; and its admissibility was put on the great inconvenience of calling all the clerks.

If, then, these rolls were receivable at all, it must be on the ground that they were original entries made in the usual course of business. These, unless the person himself who made the entries is produced, are not evidence; but they may be received where he is dead. This is the English rule of several cases grounded on *Price v. Lord Torrington*, 1 Salk. 285; s. c. 2 Ld. Raym. 873. Nor is the rule confined to the ground stated in that case: that the entry would be evidence to charge the man who made it. This is certainly one reason against allowing the inference of fraud in the entries. But there are several cases collected in the last edition of Phillipps's Evidence, 1 vol. 263-265, showing that this need not be so. It is enough if the person who made the entry be dead, that it was made in the usual course of business. *Doe, ex dem. Platteshall v. Turford*, 3 Barn. & Adolph. 890, decided since, and *Sutton v. Gregory*, 2 Peake's N. P. Cas, 150, published since, allow the same ground. The cases in the United States are numerous. Among them, are entries by deceased notaries, *Halliday v. Martinet*, 20 Johns. 168; or the runner or messenger of a bank, *Welsh v. Barrett*, 15 Mass. 380; or a cashier, *Nichols v. Goldsmith*, 7 Wendell, 160; or a merchant's deceased clerk, *Lewis's Executor v. Norton*, 1 Wash. R. of Va. 76; *Hunter v. Smith*, 6 Mart. La. (N. S.) 351; *Herring v. Levy*, 4 id. 383; *Clarke v. Ma-*

gruder, 2 Har. & Johns. 77; *King v. Maddox's Executors*, 7 id. 467. But in this class of cases, we hold that even absence beyond the jurisdiction of the court will not excuse the production of the person who made the entry; nothing short of his death. *Wilbur v. Selden*, 6 Cowen, 162. And if the entry was made by a sub-clerk, it cannot be received till he be produced, or his death shown. *Ib.*

Then were these rolls proved as the original entries of living persons, present to verify them, and testifying that they were made by them, and that they believed them to be true? This would have entitled them to be read as evidence, even though the witnesses might have forgotten the transactions which they recorded. That seems to be the established general rule as to an original entry, though it has been restricted, in this state, to entries in the course of business. In *Sandwell v. Sandwell*, 2 Comb. 445, in 9 Wm. III., *at nisi prius*, in proving words of slander, *Holt*, C. J., said, "Where a witness swears to a matter, he is not to read a paper for evidence, though he may look upon it to refresh his memory; but if he swears to words, he may read it: if he swears that he presently committed it to writing. A memorandum was denied as evidence which was not made in the course of business, in *Lawrence v. Barker*, 5 Wend. 301. *Savage*, C. J., distinguished one made of a private conversation for the convenience of the witness, from entries in merchants' books and other cases, where there is a necessity for the entry. The memorandum in question related to a conversation at the time a bond was sold. The witness had forgotten it, though he had no doubt the memorandum was true. Yet the court refused the paper as evidence. The remarks of Chancellor *Walworth*, in *Feeter v. Heath*, 11 Wend. 485, recognize a greater latitude in respect to memoranda of dates, numbers, quantities, and sums, which a witness cannot be supposed to remember. Such instances are continually occurring in the course of business; and yet our books of evidence furnish a less intelligible guide on this than on many other subjects of much less practical importance.

There is an obscurity in the text of *Phillipps's Evidence*, one of our best books, running through all his editions, arising from a failure to distinguish between original memoranda and copies or extracts. The attention of the learned constitutional court of South Carolina was drawn to this subject, in *The State v. Rawls-*

2 Nott & McCord, 334. *Nott*, J., says, "It is true that Phillipps, in his treatise on Evidence, says that 'a witness, to assist his memory, may use a written entry or memorandum, or the copy of a memorandum, and if he afterward can swear positively to the truth of the facts there stated, such evidence will be sufficient; yet if he cannot from recollection speak to the fact any further than as finding it stated in a written entry, his testimony will amount to nothing.' But by a reference to the cases quoted by Phillipps, it will be found that the rule, as laid down by him, applies only to copies of entries, and not to the original. The principal cases relied on are *Doe v. Perkins*, 3 D. & E. 752, and *Tanner v. Taylor*, a manuscript report of which Mr. Justice *Buller* read in that case. The case of *Tanner v. Taylor* was an action for goods sold; the witness who proved the delivery took it from an account which he had in his hand, being a copy as he said of the day-book which he left at home. It being objected that the original ought to be produced, Mr. Baron *Legge* said if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not, from recollection swear to the delivery any further than finding them entered in the books, then the original should have been produced. The case of *Doe v. Perkins* is more directly in point. The question was, at what time in the year the annual leases of several tenants expired. One Aldridge went round with the receiver of the rents, and minuted down their declarations respecting the times when they severally became tenants. When Aldridge was examined, the original book was not in court; but he spoke of the dates of the several tenancies from extracts made by himself out of that book, confessing upon his cross-examination, that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts was founded altogether upon the extracts which he had made from the above-mentioned book. This evidence was objected to, on the ground that as the witness did not pretend to speak to facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book ought to be produced. The presiding judge, however, admitted the evidence, and the plaintiff had a verdict. On a motion for a new trial, Lord *Kenyon*, after adverting to the case of *Tanner v. Taylor*, above mentioned, said that the rule appeared to have been clearly settled, and that every day's practice agreed with it;

and that comparing the case with the general rule, the court were clearly of opinion that Aldridge, the witness, ought not to have been permitted to speak to facts from the extracts which he made use of at that trial, and a new trial was granted. The same rule is laid down in *Peake's Evidence*." It is more important to recur to the original and leading authorities, because several adjudged cases proceeding without examination of them, have repudiated original and well-authenticated memoranda, merely because the witness, at the time of the trial, failed to recollect the facts contained in them. Such was the case of *Calvert v. Fitzgerald*, 1 Litt. Sel. Cas. 388, and such were evidently the views of *Tilghman*, C. J., in the *Juniata Bank v. Brown*, 5 Serg. & Rawle, 232, and of *Duncan*, J., in *Smith v. Lawe*, 12 id. 87. In *Maugham v. Hubbard*, 2 Mann. & Ryl. 5, 7, a witness said, from seeing his original entry, he had no doubt he had received the money. Lord *Tenterden*, C. J., thought his statement was equivalent to saying that he knew and recollected independently of the book. But *Bailey*, J., did not place the same construction on the language. Yet he was for receiving the entry in evidence, though the witness could not remember the fact. He likened the case to proof of the execution of a deed by a subscribing witness. Though he may state that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature, he has no doubt that he saw it executed; that, said the judge, has always been received as sufficient proof of its execution. His opinion was given to the same effect, in *Lloyd v. Freshfield*, 2 Carr. & Payne, 325.

A great variety of American cases have arisen where the witness, having made the entry or memorandum, could swear to his belief of its truth, but had entirely forgotten the facts which he recorded, in which the paper thus attested has been received and read in evidence to a jury. A memorandum in respect to a gambling transaction was so received against a criminal. *The State v. Rawls*, before cited. *Nott*, J., as I noticed before of *Bayley*, J., likens it, in this case, to the forgetting of an attestation, or to a clerk forgetting entries in a merchant's book. So the notes of evidence by counsel were received, though he could not remember the facts. *Rogers v. Burton*, Peck, 108, 109, 118; *Clark v. Vorce*, 15 Wend. 193. The entry of a bank clerk, who had forgotten the fact, *Farmers and Mechanics Bank v. Boraef*, 1 Rawle, 152; of a notary's clerk, who had forgotten the fact he had entered of notice

to an indorser, *Haig v. Newton*, 1 Rep. Const. Court, 423, 424; of a town clerk, who had forgotten his entries of charges for penalties, *Corporation of Columbia v. Harrison*, 2 id. 213; of a notary, entering a notice which he had forgotten, *Bullard v. Wilson*, 5 Mart. La. (N. S.) 196, with many other cases to the same effect. There is a class of cases in Pennsylvania, arising out of Lord *Kenyon's* rule requiring the very words of a deceased witness to be remembered, when his testimony is offered on a second trial, also going far to illustrate the connection which the law requires between original notes and memory. Several of them hold that the sworn notes of counsel may be read, giving the substance of what the witness swore. See also the decision of this court in *Clark v. Vorce*, 15 Wend. 193. I will only add, that taking the American cases together, they form a commentary upon this kind of evidence clear and copious, by which the views of *Nott, J.*, and *Bayley, J.*, are entirely sustained. The result is that original entries, attested by the man who makes them, may be read to the jury, though he remembered nothing of the facts which they record.

But to make the memorandum or entry competent evidence, the witness must make the entries himself, *Glover v. Hunnewell*, 6 Pick. 222, though this rule is not without its exceptions. Where some of the entries were made by the witness and some by the party, it was held that the evidence should be confined to the witness's own entries, unless he knew the facts set down by the party, and read them over shortly after the transaction. *Beddo v. Smith*, 1 Ala. 397, 398. And where a tradesman's clerk entered all goods sold in a waste-book, from his own knowledge, which the tradesman, the plaintiff, copied day by day into the ledger, in presence of the clerk, who checked them as they were copied, the clerk was allowed to use the ledger as an original book, — otherwise, said *Patterson, J.*, the original or waste-book should be produced. He put the production of the original on the legal rule which requires the best evidence. *Burton v. Plummer*, 2 Adolph. & Ellis, 341. *Denman, C. J.*, said the entries were copied while the transactions were yet fresh in the clerk's memory. *Ib.* Great care is taken by courts to guard against forgery and interpolation in these memoranda. The opposite counsel are entitled to see and cross-examine the witness in respect to them. Per *Huston, J.*, in *Cox v. Norton*, 1 Penn. 414, 415; *St. Clair v. Stevens*, 1 Carr. & Payne, 522; *Rex v. Ramsden*, 2 id. 603. *Best, C. J.*, says in *Jones v.*

Stroud, that he once committed a witness for having a simulated memorandum on the trial, though he immediately explained the matter, candidly admitting that he had drawn it up that morning. While on the stand and apparently searching for the paper in his pocket, he was ordered to hand it to the court, which he did with the explanation.

To return to the case at bar: I collect from the affidavits in the first place, that a considerable share of the entries on the check-rolls were made by the plaintiffs; and such as were, do not appear to have been read by witnesses who knew of the facts entered, immediately after they were set down; but be that as it may, they have always been under the control of the plaintiffs, and open to fraudulent interpolation. The place of the custody of such insulated memoranda is scanned very closely by many cases. The propriety of this is too obvious to need the support of authority. Besides, not being receivable, as we have seen, in the light of general book accounts of the party, nor, on the same ground, as the entries of large and indifferent commercial houses employing many clerks, but coming in and claiming credit upon the footing of simple original entries, it should have appeared that every source of primary evidence had been exhausted. All those who made the entries should have been produced, or it should have been shown that they were dead. Neither appears to have been done. As far as our cases have gone, they confine the excuse for the non-production to the death of the witness, though *Massachusetts* has received permanent insanity as an equivalent, *Union Bank v. Knapp*, 3 Pick. 96; and *South Carolina* a permanent absence from the state, *Elms v. Cheves*, 2 McCord, 350; *Tunno v. Rogers*, 1 Bay, 480.

On the whole, I think the referees in this case exceeded the bounds of the cases which are most liberal and indulgent in the reception of this kind of evidence, and that the report must be set aside on that ground.

Report set aside.

RESPONSIBILITY FOR FIRES COMMUNICATED BY COMPANIES' ENGINES.

Burroughs et al. v. Housatonic Railway Company, 15 Connecticut Reports, 124.

Where a locomotive belonging to the defendants, a duly incorporated railway company, was passing over their road, and sparks passed directly from the smoke-pipe to the building of the plaintiffs, standing eighteen inches from the side of the defendants' road, whereby the building, without any negligence on the part of the company, was burned; it was *held*, in an action on the case, that the defendants were not liable.

THIS was an action on the case. The plaintiffs alleged that the defendants caused a certain steam-engine to pass along their road near a building of the plaintiffs, from the pipe or chimney of which engine large sparks of fire were constantly passing into the open air; that the defendants, well knowing the exposed condition of said building to said sparks of fire, did not make use of proper care in passing said building with their engine, but so carelessly and negligently permitted said engine to pass along said road near to said building, that the fire from said pipe or chimney, by means of said negligence and carelessness, fell upon said building and set fire to the same, whereby said building was wholly consumed and destroyed.

It was admitted that the defendants were duly incorporated, that their road was constructed in conformity to the requirements of their charter, and that the fire was caused by sparks passing directly from the smoke-pipe of defendants' engine, while moving over their road, to the roof of the plaintiffs' building.

OPINION.

WILLIAMS, C. J. The question is, whether this company, incorporated to construct this road, and to hold lands, engines, cars, and other things necessary for the use of it, are responsible for an injury of this kind; there being no negligence or carelessness on their part. To determine this, we must look at the nature of the action. It is founded, says Ch. Baron Comyns, upon a wrong. In all cases where a man has a temporal loss or damage, by the injury of another, he may have an action on the case. Com. Dig. tit. Action on the Case, A. This injury may be caused, by the unlawful act of another, or from the carelessness or negligent manner in which a lawful act is performed. It is not every act productive of

injury to another, that lays the foundation of this action ; for, says the same eminent judge, it does not lie for a reasonable use of my right, though it may be to the annoyance of another. Com. Dig. tit. Action upon the Case for a Nuisance, C.

Have these defendants done any such act, or been guilty of any such negligence, as to subject themselves to this action ; or have they used their lawful rights in a reasonable manner ? What acts have they done ? They have built their road, and put on their engines and cars, for the purpose of transporting passengers, by means of steam power, in the manner of other railroad companies. It is not denied, that all they have done is in exact conformity with the object of the act of incorporation. All they have done, then, must be lawful, if the legislature could make it so. Where, then, is the wrong ? It is true, that a spark from their chimney struck the roof of the plaintiff's building and consumed it ; but these defendants neither guided nor directed it. In what respect does it differ from a similar injury, by a spark from a dwelling-house ? In either case, the spark proceeds from a reasonable use of one's own property ; it is guided in the same manner, takes the same direction, and produces the same injury. In the one case, we say it is the effect of accident or the hand of Providence : why not in the other ? If there be no fault in the one case, how can there be in the other ? If it be said, the sparks would not have been there, if the defendants had not come there with their engine, it may also be said, they would not have proceeded from the house, if it had not been placed there, or if there had been no fire in it. If it was a reasonable use of a house to have a fire for the ordinary domestic purposes, is it less reasonable or necessary to use fire to create steam for the use of the engine ? It has not been claimed, that this company could, in any other way, effect the object of their incorporation. It was, indeed, intimated, that the legislature could not authorize the company to do the act they have done. If by this is meant, that they could not authorize them to burn this building, without making compensation, it will not be denied. But it does not follow, that the legislature could not authorize an act, without which, in connection with other incidents, this event would not have happened. The General Assembly authorize a company to erect a bridge over a stream ; by the force of the winds a vessel or boat is driven upon one of the piers and bilged. Could it be seriously claimed, that the legislature could not lawfully cause this

bridge to be erected, because accidents might occur? And how does this case differ from that? In both cases, an event has occurred injurious to a third person, which would not have happened, had not the bridge or the railroad existed. Neither of which, however, of themselves, produced the effect. That the legislature could not take away the property of a citizen for public use, without compensation, is a fundamental principle. But to say that they can pass no act, which, in its remote consequences, and in connection with other causes, may affect private property, is a refinement which has never been recognized. If this improvement was for a public object merely, and the defendants stood in the same light as commissioners acting *bona fide* in the execution of a public trust, then they could not be responsible, according to the cases of *Sutton v. Clarke*, 6 Taunt. 29, and *Boulton v. Crowther*, 2 B. & Cres. 703. But as the defendants are to derive a personal benefit from these improvements, we do not place the case on that ground.

It was claimed, in argument, that there was a difference between original and derivative rights. Although this may be an ingenious distinction, it is supported by no authority; and, we think, it is not founded on principle. What is an original right to property? All rights to property (unless those of the sturdy occupant are an exception) are founded upon, and regulated by, the laws of the land. They are different in different countries; and at different times, varying in the same country. They are all derivative, depending upon political establishments; not natural, but civil, rights. 2 Bl. Com. 11. What principle, then, exists, by which a right, acquired by a special legislative grant, can be distinguished from a right acquired under the general law of the land, we have not been able to discover. We must, then, come to the result, that the acts of the defendants were lawful acts.

But lawful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others, that he, who, in performing them, injures another, must be responsible for that damage. Thus, the man who turns the water from his own premises, in such a manner as to flow upon and injure his neighbor's lands, ought to respond. So where, by the custom of the realm, the owner of a house, which takes fire, and burns another house, is made answerable for the damage, it proceeds upon the ground of negligence. *Tubervil v. Stamp*, 1 Salk. 13.

And the action, as appears by the form, was grounded upon this negligence. S. C. 2 Salk. 726. So where one, whose duty it was to keep in repair sea-walls, by his negligence in repairing them, suffered the water to overflow; he must answer for that neglect; though it would be otherwise, if it had happened by the act of God, and so unavoidably. 2 Bulst. 280; *Henly v. Lyme*, 5 Bing. 91; So if one pull down his own house, in so negligent and improvident a manner, as to produce unnecessary injury to his neighbor, he is liable therefor; *Walters et al. v. Pfeil*, 1 Moo. & Mal. 362; In such case, the party must use ordinary and reasonable care; *Massey v. Goyner et al.*, 4 C. & Pa. 161; *Jones v. Bird et al.*, 5 B. & Ald. 837. So too, in the common case of running down ships at sea, or carriages on land, and the injury arises from a want of skill, or from negligence in the defendant or his servants; *Lack v. Seward*, 4 C. & Pa. 106; *Handaysyde v. Wilson et al.*, 3 C. & Pa. 528; *Hawkins v. The Dutchess and Orange Steamboat Company*, 2 Wend. 452; *Morley v. Gaisford*, 2 H. Bl. 442. On the other hand, when the party is in the performance of a lawful act, and the damage arises without any blamable conduct on the part of the defendant, he will not be responsible therefor; for where there is no wrong, there can be no liability in this action. In a recent case, even of trespass *vi et armis*, this principle is ably enforced, by C. J. *Williams*, in the Supreme Court of Vermont, where the court held, that a man who had injured the person of another, by driving upon him, was not responsible, if he could not, with prudence and care, have prevented the injury. *Vincent v. Stinehour*, 7 Verm. 62. In trespass, no man should be excused, say the court, in *Weaver v. Ward*, Hob. 134, unless it be utterly without his fault.

However it may be in trespass, we think that, in this action, the rule is, that some fault must be shown in the defendant. In case for obstructing a highway, Lord *Ellenborough*, C. J., says, "two things must concur to support this action; an obstruction in the road, by the fault of the defendant; and no want of ordinary care to avoid it, on the part of the plaintiff." *Butterfield v. Forrester*, 11 East, 60. And Judge *Buller* says, "every man ought to take reasonable care that it does not injure his neighbor: therefore, wherever a man receives any hurt, through the default of another, though the same were not wilful, yet if it be caused by negligence or folly, the law gives him an action to recover damages for the injury so sustained." Bul. N. P. 25.

Where, then, there is neither negligence nor folly, in doing a lawful act, the party cannot be chargeable with the consequences. Thus, where the owner of land set fire upon his fallow grounds, which run into and consumed the plaintiff's woods, the defendant was held not to be liable, there being no negligence in him or his servants. *Clark v. Foot*, 8 Johns. 421. In a similar case in the state of Maine, it was holden, that the plaintiff must, on his part, prove negligence in the defendant. *Bachelor et al. v. Heagan*, 6 Shep. 62. So where one building a house, sunk the foundation so as to undermine that of the adjoining proprietor; it was held, that he was not responsible for consequential damages, if he used due diligence and care to prevent injury to his neighbor. *Panton v. Holland*, 17 Johns. 92. The same principle, it is supposed, governed the court, in *Thurston v. Hancock et al.* 12 Mass. 220. It is true, that a judge entitled to great respect, has suggested a doubt as to the last case. *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. 420, 638, per *Story, J.* Several of the cases cited above from the late English reports, seem to confirm the principal point in that case; and no authority has been brought by the plaintiffs, to support them in this case, except *Hooker v. The New Haven and Northampton Company*, 14 Conn. 146. And, with us, that is certainly sufficient (unless we are ready to retrace our steps), if the plaintiffs are right in their construction of it. But upon a careful review of that case, we are not able to discover any principle there laid down, which will justify the claim of the plaintiffs.

There, the defendants, under their charter, had constructed their canal, in such a manner, and placed their waste-wear so, that when the canal was full, the water would be discharged upon the plaintiff's meadows, to their great injury. It was not claimed, that the injury arose from an act of Providence, or from some unexpected calamity; nor, that the canal could not have been, by additional waste-wears, so constructed as to have avoided this result. On the contrary, the injury was the natural and necessary result of the manner in which the canal was constructed. Indeed, the very object of this waste-wear was, to protect the canal, at the risk of those around them. 14 Conn. 152. It became, therefore, apparent, and it was not denied, that the defendants were liable, unless they were protected, by the act of incorporation; and the claim was, that as they were authorized to construct this canal, under the superintendence of commissioners, and as this waste-wear had been

approved by these commissioners, the company were not responsible for any injury resulting therefrom, as individuals would be, in like circumstances. The court held, that the act did not expressly grant such a protection; and that such an implication could not arise upon a fair construction of the act: that, unless the intention of the legislature was clearly manifested, it was not to be supposed that it was intended to authorize this company to violate the private rights of individuals, without making them compensation: and a doubt was suggested, whether, indeed, this could be done. It was decided, that the defendants, in that case, were responsible for an act, voluntarily and deliberately done, which, in its immediate consequences, injured another, in the same manner as an individual would be, for a similar act. In this case, the defendants only ask that the same principle shall be applied to them as to individuals.

The cases, then, differ in several important particulars. There, it was claimed, that the canal was not supplied with sufficient waste-weirs, and so was not properly constructed. Here, it is admitted, that all has been done as the law required. There, it was claimed, that the injury might have been avoided by a sufficient number of waste-weirs. Here, the injury was unavoidable. There, the act done was voluntary, and done for self-protection. Here, it was involuntary. There, no individual could justify a similar act. Here, the defendants only ask the same protection that an individual has. We think, therefore, there is a manifest difference in the cases.

There is another fact, in this case, which, perhaps, deserves notice. The plaintiffs placed their building in the position it was, after this road was laid out. The jury, it is true, have not found, that the injury happened by their negligence; but this very fact shows, that very little danger was apprehended from the engine of this company, and strengthens the idea, that the injury was casual, unexpected, unavoidable.

Upon the whole, we think, that the defendants are entitled to a new trial.

INJURIES TO DOMESTIC ANIMALS. — FENCES. — THE DUTY OF FENCING AGAINST ANIMALS TRESPASSING UPON THE LANDS ADJOINING A RAILWAY.

Railroad Company v. Skinner, 19 *Pennsylvania State Reports*, 298.

Railways independent of statutory requisitions, and as against the adjoining land-owners, are under no duty whatever to fence their road, nor are they bound to run with any reference whatever to the possibility of cattle getting upon the track.

Every man is bound, at his peril, to keep his cattle off the track, and if he do not, and they suffer damage, he has no claim upon the company, or their servants, and is liable for damages done by them to the company or its passengers.

THIS was an action of trespass on the case against the defendants for killing the plaintiff's cow. The cow was at large upon a narrow piece of unenclosed land between the defendants' railway and the public highway, about sunset in May or June, when the mail train came along, running at their usual speed of twenty-five to thirty miles an hour. When about three hundred feet from the train the cow sprang upon the track. The whistle was sounded, the engine reversed, and signal given to apply the brakes. The engine ran over the cow, and one or two cars were partly thrown from the track.

OPINION.

GIBSON, J. An action for such an injury as is laid in this declaration is founded in negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in the usual way, and its act was lawful. Doubtless, case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge v. The Grand Junction Railway*, 3 M. & W. 244; but what is such negligence has not been entirely determined. In *Aldridge v. The Great Western Railway*, 4 Scott, N. R. 156, s. c. 1 Dowl. N. S. 247, an action was maintained for suffering sparks to fly from the engine to a bean stack; and this is all we have for it in the shape of decision. No doubt, a company is answerable for gratuitous damage; but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed; that it was within three hundred feet of the spot when the cow jumped suddenly from the ditch to the track; that the engine was instantly reversed,

and the signal given to brake ; and that alacrity could do no more. The retropulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without perilling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the wayside, and granting that the train might have been stopped within it ; yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her. But high above this stands the impregnable position that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed with which neither the person nor the property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested. Any other rule would put a stop to the advantages of railway travelling altogether. And for what deprive the country of one of the best improvements of this most wonderful age ? For no more than to enable a few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood were allowed to block the way, the prohibition of intrusion by drovers or travellers, using their own means of conveyance, would be of little use. For the sake of the company and the passengers, the conductor and his subordinates will be vigilant to remove obstructions ; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so ; and he who trusts his property to the chances of accident is bound to stand the hazard of the die. *Knight v. Abert*, 6 Penn. St. 472, is to the point. In that case, the intrusion was on wood land ; in this, it was on the exclusive possession of ground paid for as an incorporeal hereditament.

So far we have treated the case as if the plaintiff's skirts were clear, but they are not. By the common law of England, an owner

of cattle is bound to keep them in an enclosure or in custody at his peril, for every entry by them on another's possession is a trespass; by the common law of Pennsylvania, he may let them go at large without incurring liability for an entry by them on a woodland or a waste field. To entertain an action for an inappreciable injury, would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropriate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it, on the principle that the owner of a bull which has gored another's ox must pay for it. Is not the intrusion of an animal on a railway, which has a direct tendency to throw a train off the track and endanger life and members, an injury to the persons involved in the risk? It is conceded that an American company is not bound to fence its railway as an American farmer is bound to fence his fields; and this shows that persons who suffer their cattle to go upon it, do so on their own responsibility. Every English railway is fenced, not to protect from cattle, for none are at large, but to prevent detriment or detention from other causes. In a country so new and so sparse as ours, of which the tracks of the principal railways are more extensive than the island of Great Britain, the cost of fencing them would be greater than could be borne.

The rights and responsibilities of a people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them in the only way they are practicable, and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them, or paying for their transgression. The very act of turning them loose, is negligence as regards any one but an owner of a forest or a waste field; and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caittiff who has laid a log or a bar across the track, is because mischief was not intended by him. But no prudent man in his predicament would be the first to make a stir about it.

The charge was accurate in its outline, but not in its details. As has already been said, there was no evidence of negligence on the part of the defendant; yet the existence of it was left to the jury as a debatable matter. In another part, he even took the fact

for granted. "The simple fact," he said, "of permitting, for a limited time, the cow to wander on the railroad, would not of itself be such negligence as to excuse all negligence on the part of the defendant." Had there been evidence to raise the point, the direction might have been well enough; but the application of the principle in the particular instance was wrong. In *Sills v. Brown*, 9 C. & P. 601, it was ruled that in cases of accident with carriages or ships, mutual negligence, *if contributive to the injury*, bars an action for it; a principle enforced by this court in *Simpson v. Hand*, 6 Whart. 311. But it was erroneous to predicate it of a case in which the negligence was all on the side of the plaintiff. He further charged, that, "if the plaintiff *knew* his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he suffered it, *knowing* her to be there, he was guilty of such negligence as would prevent his recovery. But if his cow casually wandered away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendants' negligence." Now the making of this gratuitous imputation of negligence and ignorance of the cow's whereabouts, turning points of the cause, is the root of the error. As loss of the property is not a penalty for the owner's supineness in the care of it, of what account is his ignorance of its jeopardy? The irresponsibility of a railway company for all but negligence or wanton injury, is a necessity of its creation. A train must make the time necessary to fulfil its engagements with the post-office and the passengers; and it must be allowed to fulfil them at the sacrifice of secondary interests put in its way; else it could not fulfil them at all. The maxim *salus populi* would be inverted, and the paramount affairs of the public would be postponed to the petty concerns of individuals. Every obstruction of a railway is unlawful, mischievous, and abatable at the cost of the author or owner of it, without regard to his ignorance or intention. It may seem cruel to make a dumb brute suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of a farmer's or grazier's stock; and that their preservation is not to be left to the care which a man takes of uncared-for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to the charge of indifference to human safety, it is a high and holy charge of the courts to

hold to their duty, not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered; and to hold them hard. We are of opinion that an owner of cattle killed or injured on a railway, has no recourse to the company or its servants; and that he is liable for damage done by them to the company or the passengers. *Judgment reversed.*

We had occasion to carefully consider the subject of the duty of railway companies to fence their roads, and their liability for injuries to domestic animals thereon, in *Jackson v. Rutland & Burlington Railway Company*, 25 Vt. 150, which was an action of trespass on the case to recover the value of two horses killed upon the track of the defendants' road by a train in motion. The facts were agreed as follows:—

That by the provisions of their charter, as well as by the general law of the state, the defendants were required "to build and maintain *sufficient fence*, upon each side of their railway, through the whole route thereof."

That at the station at Brandon, the railway crosses a public highway at right angles, at or near grade, and the lands for a certain distance on each side of the highway are used for depot purposes; that the company have omitted to fence certain lands directly adjacent to their road on the east side of the highway, and that the owners of some of these lands consented to this omission. That the horses, which were kept in plaintiff's pasture, *a mile or a mile and one-half distant* from the railway, escaped from the pasture and came upon the track, by crossing either the highway or the lands unfenced with the owner's consent, or those unfenced for other reasons, and there were run over by an early train. That it was too dark at the time of the accident for the engineer to discover the horses in season to check the train; and no negligence in that respect was attributed to the defendants.

Upon these facts the question arises, for whose benefit is the company required to maintain the fences on each side of their road? This will, in a good degree, determine who may have an action for injuries consequent upon the omission to build or to maintain such fences. For right and obligation, in regard to these matters, are, for the most part, correlative and co-extensive. One cannot ordinarily have an action for any evil consequences he may suffer, by reason of the omission to perform a duty not owing to himself. There is, in law, no such privity between one remotely affected by such omission, and the person owing the duty, as will lay the foundation for an action. *Fitzsimmons v. Joslin*, 21 Vt. 129.

We cannot conceive, then, how any one can be said to be directly interested in the maintaining of fences upon a railway, beyond the adjoining proprietors of land, and those who may travel upon the road, either as passengers or workmen. And, in regard to this latter class of persons, who are only interested in this matter temporarily, for the purpose of their own security while upon the road, we have no occasion to speak here. The adjoining proprietors certainly are primarily and principally interested in the maintaining of fences upon the line of railways. There is no doubt a remote, incidental, and contingent interest in all

the citizens, in having such roads carefully fenced. One's teams, cattle, and children even, are thereby rendered less likely to receive damage by reason of the running of such roads. But this is an interest of so remote and contingent a character, as scarcely to be supposed to form the basis of so extensive and expensive a charge upon such companies by the legislature; certainly it should not be so held, unless so expressed, *in totidem verbis*, or by the most obvious implication.

Assuming, then, that this general provision in the charter of this company is for the benefit of the land-owners; and to prevent all uncertainty of construction as to the party upon whom this burden ought to rest; it seems to follow, that only the adjoining proprietors can complain of the omission, and that a proprietor can only complain of the omission adjacent to his own land. This enactment only places the defendants in the position of an adjoining proprietor, who is bound by contract or prescription to build the fences between himself and an adjoining proprietor. The statute imposes this burden exclusively upon the railway, which, as between adjoining proprietors, generally, is to be borne jointly and equally. But the matter of such division fence is always a subject of stipulation between the adjoining occupants or proprietors, or may become so, at any time, without the right of interference by any other one. Hence it was competent for the defendants to stipulate with the land-owners adjoining the road, to let the land remain unfenced, or to assume that burden themselves, and no other land-owner could complain upon the mere ground of the increased liability to injury of his cattle.

The idea of any obligation upon railways to fence their roads, for the security of cattle passing along the highway, must rest upon the hypothesis that such cattle are rightfully in the highway. Cattle are rightfully driven along the highway, and in such case, if fences and cattle-guards are omitted where they can be properly kept up, consistent with the proper use of the railway, and damage ensues, very possibly an action may lie. But in the present case the cattle were estrays upon the highway. They could certainly claim to be regarded in no more favorable light. And in this state it is not now considered that the owners of cattle have any right to depasture them in the highway. The owner of cattle is here left, since the Revised Statutes of 1839, as at common law. He is bound to keep his cattle at home. If found doing damage in one's field, they may be impounded, without reference to the legality of the outward fences of the field, where such cattle are found. Fences adjoining the highway are expressly excepted by the statute, while all other fences surrounding such field are required to be found legal in order to justify the party distraining. We are then compelled to fall back on the common law, as to the obligation to build fences adjoining the highway, and the right of the owners of cattle to feed them in the highway. And here there seems little doubt.

At common law, the subject of fences is seldom much discussed, it being every man's duty to keep his own fields fenced for the purpose of restraining his own cattle, rather than those of others. If his cattle went at large, and did damage, they are liable to distress, as matter of course, unless in some way the owner could show a right to have his cattle where they were found, or unless some prescription or contract changed the general obligation to fence.

This subject is a good deal discussed in the English books, in regard to rights of common and pasturage; but the question in regard to fences never arises, unless as connected with certain rights of exclusion from the commons, permanently or temporarily, or in regard to some prescription or duty, attaching to the land. And so, fences are always good enough at common law, which answer their end, of keeping one's own cattle enclosed, and always insufficient, if they fail to answer that purpose. If one's cattle went abroad, either by permission or accident, the owner was liable for all damage. One had no right to depasture his cattle in the highway. For by so doing, he was infringing the rights of the owner of the soil and freehold, although encumbered by the public right of way. This right of way gave the public no right to the trees and herbage growing upon the land, or to the stone and minerals under the soil. That was as much the property of the owner of the freehold as before. Cattle have only the right of *passage* upon the highway; if upon it for any other purpose, they are trespassing. (2 Roll. Ab. 566, pl. 1, *Dovaston v. Payne*, 2 H. Bl. 527.)

It is nowhere pretended that taking land for a highway gives the public any thing more than a right of way in the land. And if all the other rights in the soil remain to the owner as before, and this is nowhere questioned, but recognized in all the cases at common law, we do not readily comprehend how any one can be said to have any more right to have his cattle in the highway, either as estrays or *levant and couchant*, than in any other man's field. And such is the language of the cases upon the subject. But it is competent, no doubt, for the owner of land encumbered by the highway, to occupy it in common with other owners, as is generally done in this state, and to suffer others, not having any interest in such lands, to feed cattle in the highway; and so long as he acquiesces in this mode of occupying the highway, and until he gives notice of dissent, he may probably be bound by it. But I should entertain no doubt of the right of any one to dissent from any such arrangement by common consent, and exclude cattle from his lands, across which the highway passed, and to maintain an action against the owner of cattle depasturing upon such lands, after notice to restrain them. And it is certain that our statute, since 1839, expressly excuses all landholders from fencing adjoining the highway. For if they may impound cattle found doing damage in a field where the fence is not legal, they may where there is no fence; and by parity of reasoning, if cattle are thus liable to distress, it must follow that they are wrong-doers in the highway, as, if they were rightfully there, the adjoining proprietors must of necessity be made to fence against them. And if land-owners generally are not bound to fence their lands off from the highway, much less should railway companies be required to do so. For in most cases, such a requirement of them would, on the present plan of crossing highways at grade, be altogether impracticable, and would impose upon such companies the burden of raising their roads and station houses above grade, so as to exclude all highways from their level, which, it is believed, was never required by their charters.

The right of a railway company to the exclusive possession of the land taken for the purposes of their road, differs very essentially from that of the public in the land taken for a common highway. The railway company must, from the very nature of their operations, in order to the security of their passengers,

workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, by the former owners, in any mode and for any purpose. Any other view of the subject must lead to the imminent peril of life and property, and ultimately to the most glaring absurdities. How far this difference will affect the right of the former owners to the herbage growing upon the land, or to dig up the soil and subsoil, it is not needful here to consider. It is obvious that the right of the railway to the exclusive occupancy must be, for all the purposes of the roads, much the same as that of an owner in fee; and the company certainly owes no duty to persons or property in the highway, or the fields adjoining the railway, unless rightfully there. Hence, from what has been said, we must conclude that estrays, or cattle suffered to go at large in the highways for the purpose of pasturage, are altogether at the risk of the owners, until they are brought back to some point where they may rightfully remain. And the fact that the business of the defendants is one of extraordinary peril to cattle coming upon the road, can make no difference.

The business of the defendants is one legalized by the legislature, by universal consent, and one where the public, at present, make very extraordinary demands in regard to speed, which it would be ruinous to the interests of defendants to disregard. Under such contingencies, it is of the first necessity that cattle should be excluded altogether, and beyond all peradventure, from the track of the railway. This it is impossible for the company to do effectually, short of a very disproportionate expense. But the owners of cattle may each restrain his own, as the law requires him to do, with very little difficulty. And if this is not done, the loss should fall upon the owner, who is legally in fault.

And if sometimes, through defect of fences, or from any other cause not implying moral delinquency, his cattle stray accidentally, so to speak, upon the railway, he must be content to take the chance of their destruction, and, under the circumstances, should, one would think, deem himself fortunate if no greater damage is sustained by any one than the destruction of the cattle, where so much must, of necessity, be put to hazard. And this has always been regarded as the law upon analogous subjects, where animals trespassing have met their destruction. (*Blyth v. Topham*, Cro. Jac. 158; *Deane v. Clayton*, 7 Taunton, 489; 2 Eng. C. L. R. 183; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; 5 Eng. C. L. R. 295; *Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, 8 M. & W. 782 (1841); *Townsend v. Wathen*, 9 East, 277; *Bush v. Brainard*, 1 Cow. 78; *Johnson v. Patterson*, 14 Conn. 1.)

The principle of these cases, applied to the case in hand, would certainly most obviously require that plaintiff should keep his cattle off defendants' road, or else not complain of their destruction.

But a brief consideration of the rules of the common law, in regard to the rights and liabilities of different parties in reference to fences, will show still more obviously the utter want of foundation in the plaintiff's claim. It is well settled, that where one suffers loss through the want or insufficiency of fences which he is himself bound to repair, he cannot recover. If then the obligation upon defendants to build a fence along their road is a duty to the adjoining proprietors only, and by consequence may be omitted or shifted to the other party

by his consent, it must follow, that in such event, that party could not recover for any damage done to his cattle by the company, and of course no third party could recover of them for damage done to his cattle by straying into said field, and thence upon the track of the railway, if it was at the time the duty of *land-owners* to fence the land. And it certainly could not be fairly contended that the owner of such cattle, which were trespassing in such field, could recover of the owner of the field for not fencing it. If so, any trespasser might recover of a party for damages sustained by reason of the land not being kept in the safest possible state, for all uses to which anybody might choose to put it; which would be absurd, and at variance with all cases upon the subject.

But in looking further into the law upon this subject, it will appear that even while the obligation to fence rests upon the defendants, they are only bound to fence against cattle *rightfully in such adjoining fields*. This obligation to fence only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there, and stray cattle are nothing but trespassers, presumed to have escaped through the insufficiency of their owners' fences, which in law is the same as if the owner had suffered them to go at large without any restraint whatever. (Fitzherbert N. B. 298; *Rust v. Low*, 6 Mass. 90, 99.)

The result of all our examination then is, that the plaintiff's horses were at large through the defect of his own fences, so far as the case shows, and were trespassers upon the defendants' lands, and the plaintiff had no legal claim either upon the defendants or the adjoining proprietors, to keep the railway on the adjoining lands fenced for the security of the plaintiff's cattle, while thus going at large; and that he has no remedy against any one, if they were killed by defendants' engines, without negligence, at the time, in the management of the engines. This view of the case is fully sustained in a late case in the Common Pleas in England (*Ricketts v. The East & West India Docks and Birmingham Junction Railway Company*, 12 Eng. Law and Equity Reports, 520), which is this identical case almost, in so many words, *nomine mutato*. The note of this case is in these words: "Where the plaintiff's sheep, trespassing in A.'s close, strayed on the defendants' railway which adjoined, through defect of fences which the defendants were bound as against A. to make and maintain, and were killed—*Held*, that the plaintiff could not recover either at common law (or under the English statute of 8 & 9 Victoria, ch. 20, section 68) or on the ground that the defendants exercised a dangerous trade, the obligation to make and maintain fences, both at common law and by the statute, applying only as against the owners or occupiers of the adjoining close." The only difference in the two cases seems to be in the names of the parties, and the kind of cattle killed.

The American courts have, for the most part, adopted the views we have taken of this case, in regard to the right of cattle to depasture in the highways, and the liability of railways for killing them, when casually upon their roads. (*Little v. Lathrop*, 5 Greenleaf, 356; *Lord v. Wormwood*, 29 Me. 282; *Perkins v. Eastern Railroad Company* id. 307; *Wells v. Howell*, 19 Johns. 385; *Halladay v. Marsh*, 3 Wend. 142; *The Tonawanda Railw. v. Munger*, 5 Denio, 255, s. c. affirmed, 4 N. Y. 349.) And in some of the states, it is held even, that the negligence of the railway company, in driving their engines at the time,

will not render them liable for killing cattle thus wrongfully upon the road. (Clark v. Syracuse & Utica Railroad Company, 11 Barbour, 112. Williams v. The Michigan Central R. R. Company, 2 Mich. 259. New York & Erie Railroad v. Skinner, 19 Penn. St. 298, *supra*. But this last proposition is expressly repudiated in the English cases upon this subject, and is most unquestionably unsound. The railway company cannot justify either recklessness, want of common care, at the time and after the cattle are discovered, or wanton injury. But short of that, it seems they are not liable, either upon principle or the decided cases.

The judgment of the county court is reversed, and judgment upon the case stated, entered for the defendants.

THE RESPONSIBILITY OF RAILWAY COMPANIES FOR THE ACTS OF CONTRACTORS AND THEIR AGENTS.

Hilliard v. Richardson, 3 Gray's Reports, 349.

Where the defendant employed another, for a fixed price, to alter a building into a dwelling-house, and find materials therefor, it was *held* that he was not liable for injuries arising from such materials being left on the side of the highway opposite the building by a servant of the person contracting to make the change.

THIS was an action of tort to recover damages for an injury sustained by the plaintiff under the following circumstances. The defendant, by a written contract with plan and specifications annexed, had agreed with one Shaw that he (Shaw) should alter a building of the defendant into a dwelling-house. A teamster, acting under the direction of Shaw, in the afternoon placed a pile of boards by the side of the highway but within its limits, opposite the land of the defendant upon which said building stood, intending the next morning to remove them upon said land for use upon said building. Later in the afternoon the plaintiff was driving over the highway, when his horse became frightened at the pile of boards, and run the wheel of the carriage violently against a post near the edge of the sidewalk, by which the plaintiff was thrown from the carriage and seriously injured.

OPINION.

THOMAS, J. The questions raised by the report are upon the instructions given by the presiding judge to the jury. The material question, that upon which the case hinges, is whether, upon the facts reported, the defendant is liable for the acts and for the negligence and carelessness of Shaw.

In looking upon the case reported, it is to be observed, 1st, That the acts done by Shaw, and which are charged as negligence, were not done by any specific direction, or order, or request of the defendant. 2dly. That between the defendant and Shaw the ordinary relation of master and servant did not exist. 3dly. That the acts done, and which are charged as negligence, were not done upon the land of the defendant. They did not consist in the creating or suffering of a nuisance upon his own land, to the injury of another. 4thly. That the boards placed in the highway were not the property of the defendant; that he had no interest in them, and could exercise no control over them. 5thly. That the defendant did not assume to exercise any control over them. 6thly. That there is no evidence of any purpose on the part of the defendant to injure the plaintiff, or anybody else, or so to use his property, or suffer it to be so used, as to occasion an injury.

Was the defendant liable for the negligent acts of Shaw in the use of the highway? As a matter of reason and justice, if the question were a new one, it would be difficult to see on what solid ground the claim of the plaintiff could rest. But he says that such is the settled law of this commonwealth, and that the question is now no longer open for discussion. Three cases are especially relied upon by the plaintiff, as settling the rule in Massachusetts. They are *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24; and *Earle v. Hall*, 2 Met. 353.

Stone v. Codman was this: The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed. The chief justice, in delivering the opinion of the court, said: "Without reviewing the authorities, and taking the general rule of law to be well settled, that a master or principal is responsible to third persons for the negligence of a

servant, by which damage has been done, we are of opinion, that, if Lincoln was employed by the defendant to make and lay a drain for him, on his own land, and extending thence to the public drain, he (Lincoln) procuring the necessary materials, employing laborers, and charging a compensation for his own services and his disbursements, he must be deemed, in a legal sense, to have been in the service of the defendant, to the effect of rendering his employer responsible for want of skill, or want of due diligence and care ; so that, if the plaintiff sustained damage by reason of such negligence, the defendant was responsible for such damage." The case well stands on the relation of master and servant. The work was under the control of the defendant. He could change, suspend, or terminate it, at his pleasure. Lincoln was upon the land with only an implied license, which the defendant could at any moment revoke. The work was done by Lincoln, not on his own account, but on the defendant's. The defendant was indeed acting throughout by his servants. The injury was done by the escape of water from land of the defendant to that of the plaintiff, which the defendant could have and was bound to have prevented.

The second case relied upon by the plaintiff is that of *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24. In a previous suit (*Currier v. Lowell*, 16 Pick. 170), the town of Lowell had been compelled to pay damages sustained by Currier by reason of a defect in one of the highways of the town. That defect was caused in the construction of the railroad of the Boston & Lowell Company. It consisted in a deep cut through the highway, made in the construction of the railroad. Barriers had been placed across the highway, to prevent travellers from falling into the chasm. It became, in the construction of the railroad, necessary to remove the barriers, for the purpose of carrying out stone and rubbish from the deep cut. They were removed by persons in the employ of the corporation, who neglected to replace them. Currier and another person, driving along the highway in the night-time, were precipitated into the deep cut, and seriously injured. Currier brought his action against the town of Lowell, and recovered damages. This action was to recover of the railroad corporation the amount the town had been so compelled to pay. The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let

out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defence was not sustained, nor should it have been. The defendants had been authorized by their charter to construct a railroad from Boston to Lowell, four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways, so that the railroad, if necessary, might pass conveniently over or under the same. St. 1830, c. 4, §§ 1, 11. Now it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad, and under authority of the corporation, vested in them by law for the purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; and that servant had the care and supervision of them. The accident occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston & Lowell Railroad* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say, that the fact of Noonan being a contractor for this section did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders.

The only respect, it seems to us, in which this case aids the doctrine of the plaintiff, is that the learned judge who delivered the opinion of the court cites with approbation the case of *Bush v. Steinman*, 1 Bos. & Pul. 404, as "fully supported by the authorities and by well established principles." It is sufficient to remark, in passing, that the decision of the case before the court did not involve the correctness of the rule in *Bush v. Steinman*.

The case of *Earle v. Hall*, 2 Met. 353, is the third case cited by the plaintiff, as affirming the doctrine upon which he relies. Hall agreed to sell land to one Gilbert. Gilbert agreed to build a house upon and pay for the land. While the agreement was in force, Gilbert, in preparing to build the house on his own account, by

workmen employed by him alone, undermined the wall of the adjoining house of the plaintiff. It was held that Hall was not answerable for the injury, although the title to the land was in him at the time the injury was committed. The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another ; but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury. The case of *Bush v. Steinman* is cited as a leading case, "very peculiar, and much discussed ;" but we do not perceive that the point it decides is affirmed. The general scope of the reasoning in *Earle v. Hall*, as well as the express point decided, are adverse to it.

These cases, neither in the points decided, nor the principles which they involve, support the rule contended for by the plaintiff.

But the plaintiff says that the well-known case of *Bush v. Steinman* is directly in point, and that that case is still the settled law of Westminster Hall. If so, as authority, it would not conclude us ; though, as evidence of the law, it would be entitled to high consideration.

Upon this case of *Bush v. Steinman* three questions arise : 1. What does it decide ? 2. Does it stand well upon authority or reason ? 3. Has its authority been overthrown or substantially shaken and impaired by subsequent decisions ?

1. The case was this : A., having a house by the roadside, contracted with B. to repair it for a stipulated sum ; B. contracted with C. to do the work ; C. with D. to furnish the materials ; the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. *Held*, that A. was answerable for the damage sustained.

2. At the trial, Chief Justice *Eyre* was of opinion that the defendant was not answerable for the injury. In giving his opinion at the hearing in banc, he says he found great difficulty in stating with accuracy the grounds on which the action was to be supported ; the relation of master and servant was not sufficient ; the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seemed to be too large and loose. He relied, as authorities, upon three cases only : *Stone v. Cartwright*, 6 T. R. 411 ;

Littledale v. Lonsdale, 2 H. Bl. 267; and a case stated upon the recollection of Mr. Justice *Buller*.

Stone v. Cartwright lays no foundation for the rule in *Bush v. Steinman*. The decision was but negative in its character. It was, that no action would lie against a steward, manager, or agent, for the damage of those employed by him in the service of his principal. This is the entire point decided. Lord *Kenyon* said: "I have ever understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done." The injury complained of was done upon the land of the defendant, and by his servants. It consisted in so negligently working the defendant's mine as to undermine the plaintiff's ground and buildings above it, so that the surface gave way. The mine was in the possession and occupation of the defendant; the injury was direct and immediate; the workmen were the servants of the owner.

The case of *Littledale v. Lonsdale*, in its main facts, cannot be distinguished from *Stone v. Cartwright*. It stands upon the same grounds. The defendant's steward employed the under-workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants.

The third case was but this: A master having employed his servant to do some act, this servant, out of idleness, employed another to do it; and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. What was the nature of the acts done does not appear. And whether the case was rightly decided or not, it is difficult to see any analogy between it and the case the lord chief justice was considering.

Mr. Justice *Heath* referred to the action for defamation, brought against *Tattersall*, who was the proprietor of a newspaper with sixteen others. The libel was inserted by the persons whom the proprietors had employed by contract to collect the news and compose the paper, yet the defendant was held liable. It would seem to be not very material who composed the paper, but who owned and published it.

Mr. Justice *Heath* also cited, as in point, the case of *Rosewel v. Prior*, 2 Salk. 460, which was an action upon the case for obstructing ancient lights. The defendant had erected upon his land

the obstruction complained of. There had been a former recovery for the erection ; this suit was for the continuance. The premises of the defendant had been leased. The question was, whether the action would lie for the continuance after his lease. “ *Et per cur.* It lies ; for he transferred it with the original wrong, and his demise affirms the continuance of it ; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions.”

Mr. Justice *Rooke*, in addition to the cases of *Stone v. Cartwright*, and *Littledale v. Lonsdale*, alluded also to the case of *Michael v. Alestree*, 2 Lev. 172, in which it was held that an action might be maintained against a master for damage done by his servant to the plaintiff in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. See *Parsons v. Winchell*, 5 Cush. 95.

The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities, and is not a recognition of principles before that time settled. The rule it adopts is apparently for the first time announced.

¶ Does it stand well upon the reasoning of the court? We think all the opinions given in it lose sight of these two important distinctions : In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under the efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs. The servant of the lime-burner was not the servant of the defendant ; over him the defendant had no control whatsoever ; to the defendant he was not responsible. There was no nuisance created on the defendant's land. It does not appear that the defendant owned the fee of the highway. The case is put on the ground that the lime was put near the premises of the defendant, and with a view of being carried upon them. The lime was not on the defendant's land ; he did not direct it to be put there ; he had not the control of the man who put it there.

Mr. Justice *Heath* said : “ I found my opinion on this single point, viz., that all the subcontracting parties were in the employ of the defendant.” This is not so, unless it be true that a man who contracts with a mason to build a house employs the servant of the man who burns the lime.

Mr. Justice *Rooke* said: "The person, from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It cannot be meant that one who builds a house is to be responsible for the negligence of every man and his servants who undertakes to furnish materials for the same. Such a rule would render him liable for the most remote and inconsequential damages. But the act complained of did not result from the authority of the defendant. The authority under which the servant of the lime-burner acted was that of his master. And neither the lime-burner nor his servant was acting under the authority of the defendant, or subject to his control. The defendant might, with the same reason, have been held liable for the carelessness of the servant who burnt the lime, and of the servant of the man who furnished the coals to burn the lime.

3. Has the doctrine of the case of *Bush v. Steinman* been affirmed in England, or has it been overruled and its authority impaired?

The plaintiff cites the case of *Sly v. Edgely*, at *nisi prius*, 6 Esp. 6. The defendant, with others, then owning several houses, the kitchens of which were subject to be overflowed, employed a bricklayer to sink a large sewer in the street. The bricklayer opened the sewer and left it open, and the plaintiff fell in. It was contended that the bricklayer was not the servant of the defendant. He was employed to do a certain act, and the mode of doing it, which had caused the injury, was certainly his own. Lord *Ellenborough* is reported as saying, "It is the rule of *respondeat superior*; what the bricklayer did, was by the defendant's direction." It does not appear how the bricklayer was employed. If not by independent contract, the case stands very well on the relation of master and servant. A case at *nisi prius*, so imperfectly reported, can have but little weight.

Another case at *nisi prius* was that of *Matthews v. West London Waterworks*, 3 Campb. 403, in which the defendants, contracting with pipe-layers to lay down pipes for the conveyance of water through the streets of the city, were held liable for the negligence of workmen employed by the pipe-layers. The case is very briefly stated, and no reasons, given by Lord *Ellenborough* for his opinion, reported. It may stand on the ground that the defendants, having a public duty to discharge, as well as right given, could not dele-

gate this trust, so as to exempt themselves from responsibility. This case is alluded to in *Overton v. Freeman*, 11 C. B. 872, hereafter to be examined, where *Maule, J.*, makes the following remarks concerning it: "That is but a *nisi prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed."

In *Harris v. Baker*, 4 M. & S. 27, and in *Hall v. Smith*, 2 Bing. 156, it was held that trustees or commissioners, intrusted with the conduct of public works, were not liable for injuries occasioned by the negligence of the workmen employed under their authority. These cases stand upon the ground that an action cannot be maintained against a man, acting gratuitously for the public, for the consequences of acts which he is authorized to do, and which on his part are done with due care and attention. They give no sanction whatever to the doctrine of *Bush v. Steinman*.

In *Randleston v. Murray*, 8 Ad. & El. 109, a warehouseman in Liverpool employed a master porter to remove a barrel from his warehouse. Through the negligence of his men the tackle failed, and the barrel fell and injured the plaintiff. *Held*, that the warehouseman was liable. The case is put distinctly on the relation of master and servant. Lord *Denman* said: "Had the jury been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative." The injury occurred also in the direct use of the defendant's estate.

In *Burgess v. Gray*, 1 C. B. 578, the defendant, owning and occupying premises adjoining the highway, employed one Palmer to make a drain from his land to the common sewer. In doing the work, the men employed by Palmer placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained a personal injury. There was evidence that, upon the defendant's attention being called to the gravel, he promised to remove it. The matter left to the jury was whether the defendant wrongfully put, or caused to be put, the gravel on the highway. "I think," says *Tindal, C. J.*, "there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the prin-

ciple contended for by my brother *Byles*, and that the damage should be made good by the contractor, and not by the individual for whom the work was done." After adverting to the evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction, he says: "I therefore think the case is taken out of the rule in *Bush v. Steinman*, which is supposed to be inconsistent with the later authorities." *Coltman, J.*, said: "I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer." *Cresswell, J.*, said: "No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road." *Erle, J.*, said: "The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit." This well-considered case, it is plain, so far from affirming the rule in *Bush v. Steinman*, is carefully and anxiously taken out of it by the counsel and by the court, with the strongest intimation by the latter, that, but for the difference, the action could not be maintained.

The latest case in England, referred to in the learned argument of the plaintiff's counsel, as affirming the doctrine of *Bush v. Steinman*, is *Sadler v. Henlock*, in the Queen's Bench (1855), 4 El. & Bl. 570. The defendant, with the consent of the owner of the soil and the surveyor of the district, employed one Pearson, a laborer, but skilled in the construction of drains, to cleanse a drain running from the defendant's garden under the public road, and paid five shillings for the job. *Held*, that the defendant was liable for an injury occasioned to the plaintiff by reason of the negligent manner in which Pearson had left the soil of the road over the drain. The case is put by all the judges distinctly on the relation of master and servant. And *Crompton, J.*, said: "The test here is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant that I can understand the authorities." The case of *Bush v. Steinman* is not referred to by either of the justices; but

the distinction of servant and contractor runs through the whole case — a distinction which is wholly inconsistent with the doctrine of *Bush v. Steinman*.

In *Laugher v. Pointer*, 5 B. & C. 547, and 8 D. & R. 556 (1826), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to the horse of a third person, it was held by Lord *Tenterden*, C. J., and *Littledale*, J., that the owner of the carriage was not liable for such injury; *Bayley* and *Holroyd*, Justices, dissenting. This case is, in substance, the one put by Mr. Justice *Heath*, in illustration and support of the judgment in *Bush v. Steinman*. In the opinions of Lord *Tenterden* and of *Littledale*, J., the doctrines of *Bush v. Steinman*, in their application to personal property, are examined, and their soundness questioned.

In *Quarman v. Burnett*, 6 M. & W. 499 (1840), the same question arose in the Exchequer as in *Laugher v. Pointer* in the King's Bench, and the opinions of Lord *Tenterden* and *Littledale*, J., were affirmed, in a careful opinion pronounced by Baron *Parke*. In the course of it, he says: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer — he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist."

These cases, however, do not overrule *Bush v. Steinman*, as to the liability of owners of real estate.

The case of *Milligan v. Wedge*, 12 Ad. & El. 737, and 4 P. & Dav. 714 (1840), is also in relation to the use of personal property, and rests upon the rule settled in *Quarman v. Burnett*. But in this case Lord *Denman* suggests a doubt, whether the distinction as to the law in cases of fixed and movable property can be relied on.

The case of *Rapson v. Cubitt*, 9 M. & W. 710 (1842), was this: The defendant, a builder, employed by the committee of a club to

make certain alterations at the club-house, employed a gas-fitter by a subcontract to do that part of the work. In the course of doing it, by the negligence of the gas-fitter, the gas exploded and injured the plaintiff. *Held*, that the defendant was not liable. The reasons upon which this decision is based do not well consist with the rule in *Bush v. Steinman*.

The case of *Allen v. Hayward*, 7 Ad. & El. N. R. 960 (1845), is still more directly adverse. But we pass from these to cases directly in point.

In the cases of *Reedie & Hobbit v. London & Northwestern Railway*, 4 Exch. 244, 254 (1849), the defendants, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and, by the contract, reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. In an action against the company, it was held that they were not liable, the terms of the contract making no difference. In the judgment of the court, given by Baron *Rolfe* (now Lord Chancellor *Cranworth*), alluding to the supposed distinction as to real property, the court say: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded." Without sanctioning this doctrine, as it affects a public trust, it is very plain that it directly overrules the doctrine of *Bush v. Steinman*.

The case of *Knight v. Fox*, 5 Exch. 721 (1850), is, if possible, a stronger case in the same direction — a decision which it is plain could not have been made if the doctrines of *Bush v. Steinman* were the law of Westminster Hall.

There are three cases remaining. In *Overton v. Freeman*, 11 C. B. 867 (1851), A. contracted to pave a district, and B. entered into a subcontract with him to pave a particular street. A. supplied the stones, and his carts were used to carry them. B.'s men, in the course of the work, negligently left a heap of stones in the street. The plaintiff fell over them and broke his leg. It was

held, that A. was not liable, even though the act complained of amounted to a public nuisance. And *Maule, J.*, said that the case of *Bush v. Steinman* "has been considered as having laid down the law erroneously."

In *Peachey v. Rowland*, 13 C. B. 182 (1853), the defendants contracted with A. to fill in the earth over a drain which was being made for them across a portion of the highway from their house to the common sewer. A., after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained an injury. The case had this other feature: A few days before the accident, and before the work was finished, one of the defendants had seen the earth so heaped over a portion of the drain: but beyond this there was no evidence that either defendant had interfered with or exercised any control over the work. It was held there was no evidence to go to the jury of the defendant's liability. *Bush v. Steinman* appears not to have been cited by counsel or alluded to by the court.

The still more recent case of *Ellis v. Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767 (1853), cited by the counsel for the plaintiff, only determined that a party employing another to do an act unlawful in itself will be liable for any injury such act may occasion — very familiar and well settled law.

Bush v. Steinman is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed judge, Chief Justice *Eyre*, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do — a rule which ought to have been and was expressly repudiated.

The case of *Leslie v. Pounds*, 4 Taunt. 649, not cited in the argument, has some resemblance to the cases before referred to. This was an action against the landlord of a house leased, who,

under contract with the tenant, who was bound to repair, employed workmen to repair the house, and superintended the work. Being remonstrated with by the commissioners of pavements as to the dangerous state of the cellar, he promised to take care of it, and had put up some boards temporarily as a protection to the public. They proved insufficient, and the plaintiff falling through, the landlord was held liable. The case was decided on the ground that the landlord was making the repairs, and that the workmen were employed by him, and were his servants.

The suggestion is made that, whatever may be the result of the later cases in England, the doctrine of *Bush v. Steinman* has been affirmed in this country. The cases in this court we have already examined.

The case of *Bailey v. Mayor, &c.*, of New York, 3 Hill, 531, and 2 Denio, 433, was an action brought against the corporation of New York for the negligent and unskilful construction of the dam for the waterworks at Croton River, by the destruction of which, injury was occasioned to the mills of the plaintiff. The city was held responsible. This case rests well upon the ground that where persons are invested by law with authority to execute a work involving ordinarily the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted.

Blake v. Ferris, 1 Seld. 48, seems to conflict with *Bailey v. Mayor, &c.*, of New York. Certain persons were permitted to construct a public sewer at their own expense; they employed another person to do it at an agreed price for the whole work; the plaintiffs received an injury from the negligent manner in which the sewer was left at night. It was held that the persons who were authorized to make the sewer were not responsible for the negligence of the servants of the contractor. This case utterly rejects the rule of *Bush v. Steinman*.

The case of *Stevens v. Armstrong*, 2 Seld. 435, was this: A. bought a heavy article of B., and sent a porter to get it; by permission of A., the porter used his tackle and fall; through negligence, the porter suffered the article to drop, by which C. was injured. It was held, that the porter acted as the servant of B., and that A. was not answerable. Yet this was an injury done on A.'s

estate, by his permission, and in the use of his property. This case also rejects the rule of *Bush v. Steinman*.

In *Leshner v. Wabash Navigation Co.*, 14 Ill. 85, where a corporation was authorized to take materials to construct public works, and contracted with others to do the work and find the materials, and the contractors nevertheless took the materials under the authority granted to the corporation, the corporation were held liable therefor. If the court could find that the materials were taken under the authority of the corporation, the case will stand perfectly well under the rule of *Lowell v. Boston & Lowell Railroad*, and *Bailey v. Mayor, &c.*, of New York.

The cases of *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Duxbury*, 24 Vt., 155, rest on the same principles.

In the case of *Wiswall v. Brinson*, 10 Ired. 554, the court held an owner of real estate responsible for the negligence of the servants of a carpenter with whom the defendant had contracted, for a stipulated price, to remove a barn on to his premises. This case (in which, however, there was a divided judgment, *Ruffin*, C. J., dissenting in a very able opinion) certainly sustains the doctrine of *Bush v. Steinman*.

De Forrest v. Wright, 2 Mich. 368, not cited, is in direct conflict with the rule of *Bush v. Steinman*. A public, licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. It was *held*, that the employer was not liable for the injury, the drayman exercising a distinct and independent employment, and not being under the immediate control and direction or supervision of the employer. This is a well considered case, rejecting the rule of *Bush v. Steinman*, and sanctioning the result to which we have been brought in the case at bar.

We have thus, at the risk of tediousness, examined the case at bar as one of authority and precedent. The clear weight and preponderance of the authorities at common law is against the rule given to the jury.

The rule of the civil law seems to have limited the liability to him who stood in the relation of *paterfamilias* to the person doing the injury. Inst. lib. 4, tit. 5, §§ 1, 2; 1 Domat, pt. 1, lib. 2, tit. 8, § 1; Dig. lib. 9, tit. 2, § 1.

Viewing this as a question, not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not himself do the act which caused the injury to the plaintiff. It was not done by one acting by his command or request. It was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain. It was not an act done for the benefit of the defendant, and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant, or upon land to which, upon the facts, he had any title. To say that a man shall be liable for injuries resulting from acts done *near* to his land, is to establish a rule as uncertain and indefinite as it is manifestly unjust. It is to make him liable for that which he cannot forbid, prevent, or remove. The case cannot stand on the relation of master and servant. It cannot stand upon the ground of nuisance erected by the owner of land, or by his license, to the injury of another. It cannot stand upon the ground of an act done in the execution of a work under the public authority, as the construction of a railroad or canal, and from the responsibility, for the careful and just execution of which, public policy will not permit the corporation to escape by delegating their power to others. It can only stand, where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—to adopt which would be to ignore all limitations of legal responsibility.

As the determination of this, the first and most material of the exceptions, may probably finally dispose of the cause, we have not considered the other points of exception to the rulings of the presiding judge.

New trial granted.

This subject was before the same court again in 1857, in the case of *Linton v. Smith*, 8 Gray, 147, *Thomas, J.*, delivering the opinion. The court say: "The defendants were the owners of an English vessel called the *Syphax*. They entered into a charter party to take a cargo from London, and deliver it alongside of the vessel to the owners, in the port of Boston. The consignees of the vessel in Boston, with the consent of the master, made a contract with John and Daniel Hurley, stevedores, to discharge the cargo on the wharf. By this contract, the stevedores were to unload the entire cargo for a certain gross sum, to find all

that was necessary therefor, and to make good all damage to the cargo in unloading; the master and crew to have nothing to do with it. The business of stevedores is a separate, distinct, well recognized business in Boston, which the Hurleys had followed for many years. While, under this contract, the stevedores were unloading the vessel, the plaintiff's leg was broken, through the negligence of the stevedores, or the man in their employ. This question is, whether the owners of the vessel are liable for that injury. This question, stated in another form, is, whether the relation existing between the owners of the vessel and the stevedores was that of master and servant, or contractor and contractee (the word is a bad one, but there is no substitute).

"The general rule is, that he who does the injury must respond. The well-known exception is, that the master shall be responsible for the doings of the servant whom he selects, and through whom, in legal contemplation, he acts.

"But, when the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach.

"Such, we think, is the case at bar. The Hurleys were exercising a distinct business, under an entire contract for a gross sum. The relation is that of contractor and contractee.

"The law, upon this subject, has been so recently considered by us in *Hilliard v. Richardson*, 3 Gray, 349, that we content ourselves with referring to two or three cases quite directly in point.

"There is also a well-considered case in Michigan, to the same point. *De Forrest v. Wright*, 2 Mich. 368. A public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. The court held that the employer was not liable for the injury: the drayman exercising a distinct and independent employment, and not being under the immediate control and supervision of the employer.

"The case of *Randleson v. Murray*, 8 Ad. & El. 109, and 3 Nev. & P. 239, would seem, at first, to conflict with the cases before referred to. A warehouseman employed a porter to remove a barrel from his warehouse. The master porter employed his own men and tackle. Through the negligence of the men, the tackle failed, and the barrel fell and injured the plaintiff. The warehouseman was held liable. The report does not show whether the porter was acting upon a contract to do the job for a specific sum, or on wages. The case is put, in the decision, on the relation of master and servant. See remarks of Lord Denman, C. J., and Williams, J., in *Milligan v. Wedge*, 12 Ad. & El. 741, 742, and 4 P. & Dav. 717.

"The distinction upon which these cases, and many others referred to, and examined in *Hilliard v. Richardson*, turns, is, whether the relation of master and servant exists, or that of contractor and contractee. The line of separation may be sometimes indistinct and shadowy; but, in the case before us, it is sufficiently clear.

"We are of opinion, upon the facts stated, that the owners of the vessel were not liable, and that the exception must be sustained."

In *Blackwell v. Wiswall*, 24 Barb. 355, where the defendant had obtained the exclusive right of a ferry, and suffered another to operate it for his own benefit as lessee, it was held that he was not liable for any injury inflicted upon passengers, through the negligence, or unskillfulness, of the lessee, or his servants, and even if the grantee of the ferry was guilty of a breach of duty in making the lease, it would not entitle any one to sue on that account, unless he has sustained injury resulting from the act bearing directly and not incidentally.

Harris, J., says, "The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them, that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is *respondeat superior*. It is only applicable where the party sought to be charged stands in the relation of *superior* to the person whose wrongful act is the ground of complaint. In this case, it is not pretended that the man, whose alleged negligence and unskillfulness resulted in the death of the plaintiff's intestate, was the agent or servant of the defendant, or in any way subject to his direction or control. The defendant had obtained from the proper authority an exclusive right to run the ferry. This right he permitted another person, who is called a lessee, to exercise, not as his agent or servant, or for his benefit, but on his own account. Whether the person exercising this right of ferrying under the defendant's license was the same man who was rowing and had charge of the skiff, or his employer, does not appear, but in neither case could the relation of superior and subordinate exist between him and the defendant. (See *Stevens v. Armstrong*, 6 N. Y., 435; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Pack v. The Mayor, &c.*, of New York, 8 N. Y. 222.)

"Upon this question, the case of *Felton v. Deall* (22 Verm. 170), is directly in point. The legislature of this state had granted to Deall the right, for a specified time, to maintain and use a ferry across Lake Champlain, from Ticonderoga to Shoreham. Having established the ferry, Mrs. Deall, the licensee, entered into a contract with one Hobbie, by which he was to keep and manage the ferry, at his own expense of labor, for one year. The expenses of repairs were to be equally borne by the parties, and the receipts of the ferry were to be equally divided between them. Hobbie further agreed, that he would not allow any but a faithful, honest, obliging, and temperate man to attend the ferry, and that he would be responsible for damages occasioned by wilful misconduct or neglect in its management. While Hobbie had charge of the ferry under this contract, Felton, the plaintiff, went upon the ferry-boat with his horse and wagon, for the purpose of crossing over from Ticonderoga to Shoreham. The boat was upset, and the plaintiff and his property injured. To recover damages for this injury, the action was brought against Mrs. Deall. It was held, that the contract being such as to vest the occupancy and control of the ferry in Hobbie, as the tenant rather than the servant of the defendant, she was not responsible for his acts.

"It is supposed that there is something in the fact that the license to run the ferry was granted to the defendant, which affects the question of his liability. But I think not. I agree with the plaintiff's counsel, that the license was, in its nature, a personal trust. The court is only authorized to grant licenses to such persons as they deem suitable. It has been held that such license is not assign-

able. (*Harding v. The Steamboat Maverick*, 5 Law Reporter, 106.) But yet I am unable to see how this concession can be made to aid the plaintiff in sustaining his action.

"The defendant, before receiving his license, was required to enter into a recognizance to the people, with a condition that he would faithfully keep and attend the ferry, with such and so many sufficient and safe boats, and so many men to work the same, as should be deemed necessary, &c. It is further declared, that a violation of the condition of the recognizance shall be deemed a misdemeanor, and that, upon conviction, the person guilty of such violation shall be subject to a fine, for each offence, not exceeding \$25, and further, that on proof of such conviction, the court shall direct the recognizance to be estreated for the use of the people of this state. (1 R. S. 526, §§ 1, 4.) If the defendant had, in any respect, failed to comply with the conditions of his recognizance, he might have been proceeded against in the manner prescribed by statute. So, also, it is provided that in case any person, except in certain specified counties, shall use any ferry for transporting across any river, stream, or lake, any person, &c., for profit or hire, unless authorized in the manner prescribed, such person shall be guilty of a misdemeanor, and, on conviction, shall be subject to fine, &c. (1 R. S. 527, § 8.) If, therefore, the license granted to the defendant did not authorize him to transfer the right to use the ferry to an assignee or lessee, I do not see why the person who should assume to run the ferry under such an assignment or lease, might not be liable to the penalties incurred by any person who may use a ferry without legal authority. But though this be so, the fact that both the defendant and his lessee may have exposed themselves to statutory penalties, does not affect the defendant's liability in this action. It is still true, in this case as in every other, that before the defendant can be made liable for the negligence or unskilfulness of the man who was rowing, and had charge of the boat, it must appear that the relation of master and servant existed between them. Upon the allegations in the complaint, this cannot be pretended.

"A case very similar to this is found in *Ladd v. Chotard* (1 Ala. 366). In that case, the defendant was the licensee of a ferry at the falls of Cahawba. He had given the bond required by law. The action was brought to recover the value of a wagon and horses which had been lost in crossing the ferry. It was proved on the part of the defendant, that at the time of the loss, the ferry was in possession of one Blake, to whom it had been rented by the defendant, and who was entitled to the ferriage. By a statute of Alabama it was declared, as in this state, that no person should open or establish a public ferry without a license, and a bond and security as prescribed. Yet it was held that the action would not lie against the lessor of the ferry, for the reason that the tenant of the ferry was not his servant."

LIABILITY OF THE COMPANY FOR THE ACT OF ITS SERVANTS AND EMPLOYEES, WHILE IN THE COURSE OF THEIR EMPLOYMENT, WHETHER THE ACT BE WILFUL OR NEGLIGENT, AND WHETHER ACCORDING TO, OR IN VIOLATION OF, SPECIAL INSTRUCTIONS.

Lowell v. Boston and Lowell Railway Corporation, 23 *Pickering's Reports*, 24.

A railway corporation was authorized to construct its railway across a highway, and, in the progress of the work, it became necessary, from time to time, to remove certain barriers, which were placed by the corporation across the highway, for the protection of travellers, but were adopted by the town, in which the highway was situated, and, in consequence of the neglect of the workmen to replace the barriers, at night, a traveller, in 1832, sustained an injury, and, subsequently, under St. 1786, c. 81, recovered double damages against the town. It was *held*, that the railway corporation was bound to cause the barriers to be replaced at night, although its charter contained no express provision on this point; as otherwise an accident might have happened before the town had notice, actual or constructive, and no one would have been liable for the damages.

Held, also, that the corporation was responsible for the negligence of such workmen, although they were employed by an individual who had contracted to construct this portion of the railway for a stipulated sum, the work being done by the direction of the corporation.

Held, also, that an action might be sustained against the corporation, by the town, for indemnity, the parties not being *in pari delicto*; but, that the town was only entitled to recover the single damages, as, beyond that extent, it had suffered from its own *constructive* negligence; and that the corporation was not liable for the costs and expenses of the action brought against the town by such traveller, it not appearing that such action was defended at the request of the corporation, or for its benefit.

OPINION.

WILDE, J., delivered the opinion of the court. Several important and interesting questions are involved in the decision of this case, which have been ably argued by counsel, and which we have taken time to consider with the attention and deliberation that their importance and difficulty seem to require.

Our first impressions, as to one of the questions on which the decision of the case depends, were not free from doubt. No adjudged case has been found in all respects similar; but, reasoning from analogy, taking into consideration the principles of law, and the decided cases which have the closest application to the question in dispute, we have been brought to a conclusion which appears to us satisfactory, and which will enable us to administer justice between the parties without violating any known rule of law.

The facts on which the plaintiffs rest their claim have not been disputed, except in one particular, which has been ascertained by the jury, in favor of the plaintiffs.

By the report of the case, it appears that the defendants, being authorized by law to construct a railroad from Boston to Lowell, had occasion, in so doing, to cut across and through one of the highways, situated in Lowell, and which the plaintiffs were bound by law to keep in repair, whereby it became necessary to place barriers across the highway to prevent travellers from falling into the chasm, or deep cut, made by the defendants. Barriers were accordingly so placed by them. Afterwards it became necessary for the defendants to make use of the highway, for the purpose of removing stone and rubbish from the deep cut, and the barriers were removed by persons in the defendants' employ, who neglected to replace them. In consequence whereof, two persons, driving along the highway, in the night-time, were precipitated into the deep cut, and were greatly injured, and, on account thereof, recovered large damages against the plaintiffs, which the plaintiffs have been compelled to pay. The amount thus paid they claim the right to recover of the defendants in this action, they having become liable by law to pay, and this liability having been incurred in consequence of the negligence of the defendants' agents.

The defendants resist this claim on several grounds.

1. The principles, or most of the principles, on which the defendants rely, as the first ground of defence, may well be admitted; but they furnish no criterion by which we can be guided to a legal and just decision. It is undoubtedly true that the defendants had a right to make the excavation in the highway. And they were not bound to erect barriers across the way, provided they had given seasonable notice to the officers of the town of their intended operations. So, after barriers were erected, the defendants might take them down, from time to time, if necessary, for the purpose of removing rocks and rubbish, which could not be otherwise removed. These acts the defendants were authorized to do, and cannot be responsible to any one for consequential damages. But the plaintiffs' claim of indemnity is not for damages arising from these acts. They do not controvert the defendants' right to make the excavation in the highway, or to take down the barriers when necessary. The action is founded on the negligence of the defendants' agents and servants, in not replacing the barriers when the

works were left, the day before the accident happened. These barriers, although voluntarily erected by the defendants, were approved and adopted by the selectmen of the town; and if the defendants were under the necessity of removing them, for the purpose of making use of the road, they were bound to replace them when the necessity of using the road ceased, or, at least, every evening when their agents or laborers left the works. This was imperatively required by a due regard to public safety; otherwise an accident might happen before the town had notice, actual or constructive, and no one would be responsible for the damages. It is not true, as has been contended by the defendants' counsel, that all the defendants' duties and liabilities are created and prescribed by their act of incorporation. Corporations, as well as individuals, by the principles of the common law, are bound so to exercise their rights as not to injure others. The principle, *sic utere tuo, ut alienum non lædas*, is of universal application.

2. But the defendants deny their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident happened, because this section thereof had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and who employed the workmen. We do not, however, think that this circumstance relieves the defendants from their responsibility. The work was done for their benefit, under their authority, and by their direction. They are, therefore, to be regarded as the principals, and it is immaterial whether the work was done under contract, for a stipulated sum, or by workmen employed directly by the defendants at day wages. This question was very fully discussed and settled in the case of *Bush v. Steinman*, 1 Bos. & Pul. 403. In that case, it appeared that the defendants had contracted with A. to repair his house for a stipulated sum. A. contracted with B. to do the work; and B. contracted with C. to furnish the materials. The servant of C. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. And it was held that the defendant was answerable for the damage. This decision is fully supported by the authorities cited, and by well established principles.

3. Another objection to the plaintiff's claim was made in argument, which cannot be sustained. It is objected that the defendants are not answerable for the tortious acts of their agents or

servants. And this is true, if the acts were accompanied with force, for which an action of trespass *vi et armis* would lie, or were wilfully done. But the acts complained of were not so done. The defendants' workmen had a right to remove the barriers for a necessary purpose. Their only fault was, their neglect in not replacing them at night when they left their work. For this negligence, or non-feasance, the defendants were clearly answerable.

Thus far, then, the case is free from all difficulty. The defendants were answerable to the parties injured for all damages. But the doubt is, whether they are responsible to the plaintiffs.

4. It has been urged that the plaintiffs, or their officers, have been guilty of neglect, as well as the agents of the defendants; that it was their especial duty to see to it that their roads and streets were kept in good repair, and safe for travellers; and that they, therefore, being culpable, and *participes criminis*, are not, by the policy of the law, allowed to recover damages as an indemnity against their co-delinquents.

This objection is certainly entitled to much consideration. The general rule of law is, that where two parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party. So, also, is the rule of the civil law. *Nemo ex delicto consequi potest actionem*. The French law is more indulgent, and allows a trespasser, who has paid the whole damage, to maintain an action for contribution against his co-trespasser. Pothier on Oblig. 282. Whether the latter rule be or be not founded on a wiser policy, and more equal justice, is a question which we are not called upon to decide. This case, like all others, must be decided by the law as it is, whether it be consonant with sound policy or not.

Our law, however, does not, in every case, disallow an action, by one wrong-doer against another, to recover damages incurred in consequence of their joint offence. The rule is, *in pari delicto potior est conditio defendantis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against

the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers.

This distinction was very fully considered in a case recently decided by this court. *White v. Franklin Bank*, 22 Pick. 181. In that case, the plaintiff had deposited in the bank a large sum of money, payable at a future day, in violation of a provision in the Revised Statutes, which prohibits any such deposit or loan. Both parties were culpable; but, as the defendants were deemed the principal offenders, it was held that the plaintiff was entitled to recover back his deposit.

No one will question the manifest justice of that decision; and it is fully sustained by the authorities. The cases, for instance, where persons, who had paid more than lawful interest on usurious contracts, have been allowed to recover back the surplus, although they were parties in illegal transactions, were decided on the same distinction. So, in *Smith v. Bromley*, 2 Dougl. 696, which is a leading case on this point. The plaintiff, who was the sister of a bankrupt, was persuaded to pay the defendant a certain sum of money, which he exacted as the condition upon which he would consent to sign the bankrupt's certificate; and it was held that, although the transaction was illegal, the plaintiff was entitled to recover back the money paid, she not being *in pari delicto* with the defendant. So, money paid to a plaintiff in a *qui tam* action, in order to compromise the action, contrary to the prohibition of the St. 18 Eliz. c. 5, was recovered back in the case of *Williams v. Hedley*, 8 East, 378. So in *Jacques v. Golightly*, 2 Wm. Bl. 1073, it was held that money paid to a lottery office-keeper, as a premium for an illegal insurance, might be recovered back in an action for money had and received.

In all these instances the defendants were deemed the principal offenders, and the cases were decided on the distinction already stated. This distinction, Chief-Justice Parker says, "is founded in sound principle, and is worthy of adoption as a principle of common law in this country." *Worcester v. Eaton*, 11 Mass. 377.

The principle established by these cases, arising from illegal contracts, has long been admitted, in certain cases of tort, where the parties were not *in pari delicto*. If a servant, in obedience to the command of his master, commits a trespass upon the property of another, not knowing that he is doing any injury, he is, never-

theless, answerable for the tort, as well as his master, to the party injured. Yet, he is entitled to an action against his master for the damages he may suffer, although the master also was ignorant that the act commanded was unlawful, because he is deemed the principal offender. So, if a sheriff's deputy takes the property of A., on a writ or execution against B., and A. recovers damages of the sheriff for the trespass, he may maintain an action for indemnity against his deputy; and, in a like case, if the property be taken by the command of the plaintiff, in the writ or execution against B., under a promise of indemnity, the deputy may maintain an action against the creditor on his promise, although the deputy be himself a trespasser. So, also, if A., with a forged warrant, should arrest B., and command C., to whom he shows his warrant, to confine B. a reasonable time, until he could carry him to prison, and C., being ignorant of the forgery, confines him accordingly, an action for indemnity by C. against A. would lie, notwithstanding both parties were trespassers. *Fletcher v. Harcot*, Hutt. 55; 1 Roll. Abr. 95, 98. The distinction in all these cases is the same. The parties are not *in pari delicto*, and the principal offender is held responsible.

This distinction is manifest in the case under consideration. The defendants' agent, who had the superintendence of their works, was the first and principal wrong-doer. It was his duty to see to it that the barriers were put up when the works were left at night. His omission to do it was gross negligence; and for this the defendants were clearly responsible to the parties injured.

In this negligence of the defendants' agent the plaintiffs had no participation. Their subsequent negligence was rather constructive than actual. The most that can be said of it is, that one of their selectmen confided in the promise of the defendants' agent to keep up the barriers; and, by this misplaced confidence, the plaintiffs have been held responsible for damages to the injured parties. If the defendants had been prosecuted, instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them, so far as they have been relieved from a legal liability; and the policy of the law does not, in the present instance, interfere with the claim of justice. The circumstances of the case distinguish it from

those cases where both parties are *in pari delicto*, and one of them, having paid the whole damages, sues the other for contribution.

From a view of the evidence reported, and the finding of the jury, we are to consider that the defendants' agents or servants were, while employed in the construction of the railroad, the principal, if not the only, actual delinquents, and that, for their delinquency, the defendants are responsible to all persons suffering damage thereby; and they, in their turn, may maintain an action for indemnity against their negligent agents or servants. Unless, therefore, the plaintiffs are estopped by some inflexible principle of law, they are entitled to indemnity, so far as they have suffered a loss by the fault of the defendants' servants; and, holding as we do, for the reasons stated, that they are not so estopped, we are of opinion that they are entitled to recover.

They are not, however, entitled to a full indemnity, but only to the extent of single damages. To this extent only were the defendants liable to the parties injured; and, so far as the plaintiffs have been held liable beyond that extent, they have suffered from their own neglect, and, whether it was actual or constructive, is immaterial. The damages were doubled by reason of the neglect of the town; and, although there was, in fact, no actual negligence, yet constructive negligence was sufficient to maintain the action against them; and they must be responsible for the increased amount of damages, and cannot throw the burden on the defendants.

The only remaining question relates to the costs of the former action against the town. And we are of opinion that the plaintiffs are not entitled to recover any part of those costs. The ground of defence in that action, on the part of the town, was, that they had no sufficient notice of the defect in the road, and that the remedy for the injured party was against the present defendants. The suit, therefore, was not defended at the request of the defendants, or for their benefit; at least no such request has been proved, and the ground of defence, taken by the town in the former action, is well remembered, although it does not appear in the present report. If the claim of the injured parties had been made on the defendants, or if they had had notice that the town defended the suit against them, in behalf of the defendants, they might have compromised the claim. But, however this may be, we think there

is no ground on which the defendants can be held liable for the costs and expenses of the suit against the town.

Judgment for the plaintiffs.

In *State v. Vermont Central Railway*, 27 Vt. 103, which was an indictment against the defendants for a nuisance, in obstructing a public highway, by building and maintaining their depots within its limits, and by "unlawfully and injuriously suffering their engines and cars, and also horses, carts, wagons, &c., to remain in said highway a great and unreasonable length of time," we had occasion to discuss the question made by the defendant, — that a railway corporation is not liable to indictment because its agents and officers have erected and maintained a common nuisance; but that the only remedy is against such officers and agents. This view it was attempted to maintain by reasons which really assume a very specious exterior, but which are, as it seems to us, quite at variance with the general course of decisions upon the subject at the present time. It is said, a corporation being created for the performance of certain functions and duties, having no power to do a wrongful act, can only be indicted for their non-feasance of such acts as are required of them in their charter, and the laws governing them, but not for positive misfeasance of their agents, inasmuch as such persons are not their agents for any such purpose.

But this view is diametrically opposed to the uniform current of decisions in this state in regard to the liability of such corporations. Ever since the decision of *Lyman v. White River Bridge Company*, 2 Aiken, 255, corporations in this state have been held liable for torts committed in the prosecution of the business of their incorporation as much as natural persons. They may be guilty of trespass, as was held in that case and of trespass on the case, for positive wrongs, as well as neglects; and one may find any number of cases in England, since they have adopted the American view of the subject, upon the strength of the American cases; and always in this country corporations have been held liable for their torts. Actions, both of trespass and trespass on the case, have repeatedly been maintained in this court against the different railway corporations in the state for various acts of misfeasance, many of which are reported. And if any individual sustained special damage by means of their erecting or maintaining a nuisance, there can be no manner of doubt of his right of action against them, provided this were done in the course of the prosecution of their ordinary charter business as appears in the present indictment.

And an indictment for a nuisance is only a mode of trying the right, in a public form, the same right which is involved in every private action for the same cause. And the same course of reasoning by which it is here attempted to deny the liability of defendants to an indictment for such tort, also equally excuses them from all liability for all torts, and carries us at once back to the old common-law notions upon the subject of the utter inability of a corporation to commit a tort.

Once allow this proposition, and railway corporations acquire an immunity which would become as dangerous to themselves as it is unreasonable in itself, and as it probably might become offensive to the public. The case of *Benson v. Munson and Brimfield Manufacturing Company*, 9 Met. 562, does not in our

opinion, favor any such view of the subject. The fact that the agents of the defendants are equally liable with themselves, argues no incongruity. That is so, in regard to all accessories in misdemeanor. The case of *State v. Great Works Milling and Manufacturing Company*, 20 Maine, 41, is directly in point for the defendants; and it is in our judgment, radically unsound in principle. The case of the *Queen v. The Great North of England Railroad Company*, 58 Com. Law, 314, is equally in point for the prosecution, and is based upon such sensible, broad, and comprehensive views of the subject as to leave very little to be desired by way of argument in its favor. We certainly do not feel it incumbent upon us, after what is there said, and also in *Angell & Ames on Corporations*, in commenting upon the comparative soundness of the two last cases to say more upon this point.

Where a mortgage of a railway had been executed to trustees for the benefit of bondholders, and the trustees, after entering into possession, leased the railway to others; but, under a verbal agreement, continued to operate the road for the lessees and receive the earnings, paid the expenses, selected, contracted with, and discharged the persons employed on the road, and exercised all the powers usually exercised by railway corporations over their own roads, the trustees were held responsible for an injury sustained by reason of the negligence of one of the persons so employed. *Ballou v. Farnum*, 9 Allen, 47. When the defendants, a railway company, employed a day laborer, paying him monthly, but at a fixed rate for each day's labor, and this laborer took down the bars on the fence on the side of the railway track for the purpose of passing with a team, being engaged at the time in business for himself, and left them down, whereby the plaintiffs' horses escaped from his adjoining field on such track, and were killed by the passing engine of the defendants; and it was proved that it was the duty of said laborer if he saw any thing amiss after his day's work was over to give attention to it without being specially directed so to do; it was held, that defendants were liable to the plaintiffs for damages, and it did not affect the plaintiffs' legal rights that said laborer was intoxicated at the time. *Chapman v. N. Y. Central R. R. Co.*, 33 N. Y. Ct. Ap. 369. But where a railway company agree to carry A.'s horse free of charge, and at the end of the journey the station-master demanded payment for the horse, and on A.'s refusal gave A. in custody to the police, till it was ascertained that all was right, it was held that A. had no right of action against the company, inasmuch as the company would have no right to detain A., even had he wrongly taken the horse on the train without paying, and therefore there was no implied authority from them to the station-master to do so. *Poulton v. S. W. Railway Co.*, Law Rep. 2 Q. B. 534. But where the servant of a railway company arrested the plaintiff under circumstances which, if his views of the facts had been correct, would have justified the arrest, the company was held liable. *Goff v. Gt. North. R. R.*, 30 L. J. Q. B. 148. The defendant was engaged in constructing a sewer, and employed men with horses and carts. The men were allowed an hour for dinner, but were directed not to go home or leave their horses. One of the men, however, went home about a quarter of a mile out of the direct line of his work to dinner, and left his horse unattended in the street before his door. The horse ran away, and injured the plaintiff's fence. It was held, that the jury were justified in finding that the man was acting within the scope of his employment. *Whatman v. Pearson*, Law Rep. 3 C, P. 422.

In respect to the pleading in such cases if the injury be *wilful* and committed by the *defendant himself*, and the injury *immediate*, the action *must* be trespass; almost all the cases concur in this. So, too, if the injury is *immediate*, and the defendant *positively does* any act *producing*, or increasing the injury, trespass is the appropriate remedy. But when the only fault of the defendant consists in *negligence*, being a mere *non-feasance*, although the injury is *immediate*, the appropriate remedy is case. The cases will be found, we think, to sustain this view. Some cases go so far as to affirm that in the last class of cases, and in all cases where the injury is *immediate*, the *proper* action, perhaps the *only* action, is trespass; but the better opinion seems to be "that when injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act be *immediate* so long as it is not a wilful act." *Williams v. Holland*, 10 Bing. 112; *Clafin v. Wilcox*, 18 Vt. 605.

INJURY BY NEGLIGENCE OF FELLOW-SERVANT, OR DEFECTIVE MACHINERY.

Farwell v. Boston and Worcester Railway Co., 4 Metcalf's Reports, 49.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them, for an injury received by him in consequence of the carelessness of another while both are engaged in the same service.

A railway company employed A., who was careful and trusty in his general character, to tend the switches on their road; and after he had been long in their service, they employed B. to run the passenger train of cars on the road: B. knowing the employment and character of A. *Held*, that the company were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches.

THIS was an action of trespass on the case. The plaintiff was employed by the defendants as engineman, and while in such employment and running a passenger train, run his engine off at a switch on the road, which had been left in a wrong condition by Whitcomb, another servant of the defendant, who had been long in their employment, as a switch-man or tender, and had the care of switches on the road, and was a careful and trustworthy servant in his general character, and as such servant was well known to the plaintiff. By such running off, the plaintiff sustained the injury complained of in his declaration.

OPINION.

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case,

where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains ; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service ; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431 ; M'Manus v. Crickett, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another ; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civilitur*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity ; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondet superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument ; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondet superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relations of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, — or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests ; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. *Priestly v. Fowler*, 3 Mees. & Welsb. 1 ; *Murray v. South Carolina Railroad Company*, 1 McMullen, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some pur-

poses ; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and in the navigation of the vessel, their agents. *Copeland v. New England Marine Ins. Co.*, 2 Met. 440-443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited : a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper ; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest

inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger-carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590, *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.*

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

* See *Winterbottom v. Wright*, 10 Mees. & Welsb. 109; *Milligan v. Wedge*, 12 Adolph. & Ellis, 737.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a rope-walk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or

implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance,

the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company, — are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants under the circumstances were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained. *Plaintiff nonsuit.*

The case of Warner, Adm'r v. The Erie Railway Co., 39 N. Y. (Ct. Ap.) 468, and also reported in 8 Amer. Law Reg. 209, decided within a few months, discusses the general subject of Farwell v. B. & W. Railway Co., *supra*, and carefully discriminates between the principles upon which it is decided, and those which have been held in cognate cases; and as it presents a phase of the general question which is new in that state, we think it a commentary upon the general subject which will be valuable to the profession.

It was an action to recover damages arising from a personal injury, which resulted in the death of one of the defendants' employees. The deceased was a baggage-master, and when killed was in the discharge of his duty as such on a train of cars going from Hornellsville, east, on the defendants' railway. One of the defendants' bridges, over the Conhocton River, fell as the train of cars was passing over it. The jury found that the bridge fell from decay in its timbers. The bridge was properly constructed, and was originally of sufficient strength for the purpose for which it was intended.

The following points were decided as reported in Amer. Law Reg. : —

A railroad company, in its character of master, is responsible to its employees for the proper construction of its road, its adjuncts, and equipments, and the selection of competent and skilful subordinates to supervise, inspect, repair, regulate, and control its operations. If it fails in any of its duties in these respects, and its servant thereby sustains injury, he may recover.

If, however, these obligations are once performed, and its structures are properly made, and it employs, from time to time, competent and trustworthy agents, to examine and test the continued efficiency of such structures, and these tests are applied with the frequency, and in the manner, which time and experience have sanctioned, no action will lie, though its structures turn out to be insufficient, and the servant in consequence is injured. The board of directors, as representing the company, is under no further duty to such servant. It cannot be held to warrant the actual competency of his fellow-servants. Actual notice of insufficiency must be brought home to such board of directors, as representing the corporation, as a prerequisite to liability.

Where, under such circumstances, a bridge, belonging to the company, fell, while the plaintiff, in the course of his employment, was passing over it upon a train :

Held, in the absence of notice of its insufficiency, that it was error to leave the question of negligence to the jury.

BACON, J. In approaching the consideration of this case, which, in the precise aspect it assumes, may be deemed, in the courts of this state, a pioneer case, it is important to distinguish the principles which are to decide it from those which have been held in cognate cases, and especially to ascertain the precise ground on which the charge and rulings of the judge upon the trial proceeded, and by which we are to assume the jury were guided in rendering their verdict.

In the first place, then, it is to be remarked, that the defendant in this action is not responsible, and is not to be made liable for injuries suffered by one of its employees, solely through the carelessness or negligence of another employee of the defendant, engaged in the same general business. The liability to injury from such a source is one which each employee takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he enters, and in respect to which he becomes, so to speak, his own insurer.

In the second place, the cases which establish this general rule, maintain also the further qualification or extension of it, that the liability is not enlarged by the fact that an injured employee is of an inferior grade of employment to that of the party by whose carelessness the injury is inflicted and the damage caused, provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end.

These principles have been often under discussion, and are settled by an array of authorities which it is hardly necessary to cite in detail. The following, among many others, may be deemed sufficient for the purpose: *Priestly v. Fowler*, 3 Mees. & Wels. 1; *Coon v. Utica and Syracuse Railroad Company*, 5 N. Y. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75.

The only ground, then, which the law recognizes, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the management of its affairs, or the selection of its agents or appliances, the omission of which occasioned the injury, and which, if they had been exercised, would have averted it. We are not now dealing, it must be remembered, with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employee, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments.

The ground of liability affirmed in this case, and on account of which a recovery was had, was the alleged weakness, decay, and defectiveness of a bridge of the defendant, by the falling of which the death of the intestate was occasioned. The allegations of the complaint are, that the defendant did not use ordinary or reasonable care and diligence in providing a safe and suitable bridge over the Conhocton River, at the place in question; that before the breaking down of the bridge, the defendant had noticed that it was unsafe and insecure for the passage of trains thereon, and that defendant carelessly and negligently failed to cause a suitable examination to be made of said bridge for the purpose of ascertaining whether it was unsafe and insecure. It is further alleged that if any examination was made, it was made by servants and agents who were careless and incompetent, to the knowledge of the defendant, and in the selection and employment of whom the defendant had not used ordinary care and diligence. With these allegations in view as constituting in the mind of the pleader the gravamen of the action, let us see what the case really disclosed, and in what respect it was presented to the jury.

At the close of the plaintiff's testimony there was a motion to nonsuit, founded on the alleged absence of any proof to show negligence, or of any knowledge or notice to the defendant of the unsafe character of the bridge, and this motion was renewed at the close of the testimony. The judge, in reference to this demand, held, that there was not any evidence for the jury to consider, relative to the original sufficiency of the bridge, nor any testimony impeaching the competency of the defendant's employees. He further stated, that there was only one question for the jury, and that was whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition; that if the jury should be satisfied that the bridge was unsafe from decay, and that occasioned its fall, and the directors were guilty of negligence in not discovering the fact, the plaintiff would be entitled to recover, and that this question alone must go to the jury. To all which the defendant's counsel excepted.

At the close of the charge there was a request to instruct the jury in relation to the actual knowledge of the defendant's employees, and their omission to remedy such known defect, assented to by the court, which, if the defendant's counsel had been content to stand upon, would have actually precluded a recovery in this case; but I agree with the opinion of the Supreme Court, that this request and instruction was virtually waived by the counsel, and revoked by the court in the subsequent ruling, and that it may therefore on this appeal be laid out of the case.

The final instruction of the court, in answer to a request to charge that it was necessary to show that the decay in the bridge, if it fell from decay, was known by some notice, or otherwise, to the president and directors, was that if the board of directors, by the exercise of that care and skill that is to be expected of persons occupying the same position, could, by the exercise of reasonable diligence and skill, have ascertained or known the defects in the bridge, the failure on their part to ascertain would make the defendant liable, because it is negligence, and substantially the same as if notice had been given to the board. To this proposition the defendant's counsel excepted.

There is a little vagueness, and perhaps inaccuracy, in the expression used as to the care and skill which was "to be expected in persons occupying the same position," which might possibly

have tended to mislead or confuse the jury, had not the judge in the earlier part of the charge explained that the care and diligence which the directors were required to bestow, was that reasonable care, skill, and foresight over the affairs of the corporation, which reasonable and prudent men occupying such positions ordinarily exercise under the same circumstances. With this qualification, then, I think the charge is not liable to any serious misconstruction, and presents with sufficient distinctness the proposition the judge was requested to charge, and the one he actually presented to the jury.

Let us see, now, what the case disclosed, upon the concession of all parties, and upon clear and uncontroverted evidence. We start with the admission that there was no question as to the original sufficiency of the bridge, and no impeachment, whatever, of the competency of the defendant's employees. Two leading and important averments of the complaint are thus disposed of *in limine*. It is then proved by evidence not sought to be contradicted, that, by these competent agents, a frequent inspection and examination of the bridge was made, the usual and accustomed tests, long employed, and deemed ample and sufficient, were applied to the structure in its various parts, and no imperfection or decay was detected, and none was visible upon an outward and external inspection; and, on the day before it fell, a special observation was made of the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. If it be said that the test of boring the timbers was not applied, the answer may very well be, that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, or, so far as the testimony shows, upon any other; and, carried too far, becomes, itself, a source of weakness; and that, while, after a catastrophe has occurred, it is sometimes easy and quite common to say, that if something else unusual and unthought of had been done, it might possibly have been averted, ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, does not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

There was one more element invoked to attach liability to the defendant consequent upon the fall of this bridge, and that was the length of time it had stood. It was constructed in the fall of

1855, and had remained until the time of the accident, a period of about nine and a-half years. The evidence showed that bridges of similar construction and materials upon the defendant's road had stood over ten years, and were considered, and to all appearances were, sound and safe; some had stood over fourteen years, and one over seventeen years, in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet, if, upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand, would have no appreciable weight in the scale of evidence. There is really, then, no conflict of evidence as to the care and skill used in the construction and maintenance of this bridge, the inspection to which it was subjected, the adequate skill and competency of the employees engaged in that specified duty, the experience of defendant, both in the construction and duration of such structures, and the absolute want of any actual notice to defendant or any of its employees, of any defect real or suspected in this bridge. And this being so, upon undisputed evidence, the conclusion, in my judgment, is inevitable, that the defendant was not guilty of the want of such care in respect to their employees, as it was their duty (representing, as, it is conceded, the board of directors do, the corporation itself) to bestow upon its officers. If this conclusion is sound, then it seems very clear to me, that it was the duty of the court to take the case from the jury, and hold, that, on the established facts, the plaintiff could not recover, but, that, at all events, the defendant was entitled to the instruction the counsel asked, to wit, that, in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known, by some notice or otherwise, to the president and directors of the road.

The true principle applicable here is, I think, that, when the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skilful and trustworthy agents to supervise, examine, and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such

care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences.

A broader liability than this cannot be imposed without, in my opinion, breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee, and the rule laid down by the court in this case would practically make the railroad company an insurer of the latter as well as of the former, and in the words of a learned judge, in a parallel case, "a latent defect in a steam boiler, a rotten plank in a ship, a flaw in an iron rail, an unknown weakness in a floor, would charge the master with all the damages to his employees in consequence thereof."

A different and more stringent rule than I have thus suggested would impose an intolerable burden upon a board of directors, and, carried to its legitimate results, would require them to give their individual and personal attention, not only to the construction, but to the actual existing condition of their road, with all its structures, appliances, and machinery. They must supervise and constantly examine every locomotive, passenger, and freight car, rail, tie, wheel, axle, and brake, and be responsible for the consequences that may arise to an employee from a latent defect, not cognizable by the senses of an experienced and skilful mechanic, nor capable of detection by the faithful application of well-known, long used, and approved tests.

The doctrine upheld by the court in this case, maintains in effect that a railroad corporation must have a board of directors, not only possessing adequate skill to determine whether its competent employees perform their duty, as between the corporation and its other employees; but if there be an omission of duty on the part of such skilful employees which the directors have themselves failed to discover, the corporation is guilty of negligence, and responsible to an injured employee for all the consequences resulting therefrom. Such a rule, I am persuaded, would not only carry their corporate liability beyond reason, but beyond the fair scope of any authority which has been invoked to maintain it.

I do not think it would be profitable to go over, in detail, the

long array of authorities which have been cited by the counsel on both sides in this case, to sustain and justify their respective positions. They have been mostly collected, and the purport of them very fully and fairly stated in the opinion prepared by Mr. Justice Miller, upon the former argument of this case. I have carefully examined them, but shall not venture to collate or comment upon them further than to remark, that, while, on the one hand, some of them contain statements and discussion of principles that may be invoked in favor of the claim to recover, put forth by the plaintiff's counsel, and sustained upon the trial of this cause, none of them go the full length required to uphold the ruling of the judge; while, on the other hand, several cases go far, as I understand them, in maintaining the doctrine I seek to apply to this case, and in one instance the decision is fully and directly in point.

Thus in *Torrent v. Webb*, 18 C. B. (86 E. C. L.) 795, it is held that a master is not responsible for an injury to a servant for the negligence of a fellow-servant, provided the master uses reasonable care in the selection of the servant. *Jervis*, C. J., in this case makes the significant remark, that the master may be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons.

In the leading case of *Priestly v. Fowler*, 3 M. & W. 1, it was held that the servant could not recover of the master for injuries resulting from the breaking down of an iron railing from defective construction, when there was no proof of knowledge on the part of the master of the defect; Lord *Abinger* remarking, that the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.

In our own state, the point has never been fairly presented. In *Keegan v. Western Railroad Co.*, 4 Seld. 175, the defendant had express and repeated notice through the reports of its own servants, of the defectiveness of the engine, through the explosion of which the injury to the plaintiff was occasioned. In *Ryan v. Fowler*, 24 N. Y. 410, the master had the same notice of the defectiveness of the structure, through the falling of which the plaintiff suffered the injury for which he recovered.

In *Wright v. New York Central Railroad Co.*, 25 N. Y. 562, a recovery by an employee against the company for an injury occasioned by the conduct of another employee, was set aside on

the ground that the action could not be maintained unless the injury resulted from unskillfulness for which the company was responsible.

In discussing the principle applicable to cases of this character, Judge *Allen* says: "If the injury arises from a defect or insufficiency in the machinery or implements furnished by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own personal negligence or want of care; in other words, it must be shown that he either knew, or ought to have known, the defects which caused the injury. Personal negligence is the gist of the action."

We have been referred to a number of cases in the courts of our sister states, none of which are very apposite to this precise case, except *Snow v. Housatonic Railroad Co.*, 8 Allen, 441, which the plaintiff's counsel invokes as a clear authority in his favor, but which is susceptible of the criticism that the defect in the track through which the injury was suffered, was palpable to view, and was known to and was very grossly neglected by the track repairer, whose specific duty it was to remedy the defect; and the case of *Hand v. Vermont Central Railroad Co.*, 32 Vt. 473, which is precisely in point for the defendant, and holds this distinct proposition, that although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery and faithful and competent employees, and although they are liable to their servants for the neglect of this duty, yet after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured.

It is said, and it may be conceded, that this case is in advance of any decision yet made, where the precise principle is involved; but, if so, it is in my opinion a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and injury results to one of their servants from a failure to remedy the defect through which the injury occurs. It holds them to the highest measure of responsibility for the proper construction of the road, its adjuncts,

and equipments, and the selection of competent and skilful subordinates to supervise, inspect, and repair, and control and regulate its operations ; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and underwriters for every injury which an employee in their service might suffer from the act or omission of his fellow-servant.

Since the argument of this case, and the preparation of the foregoing opinion, my attention has been called to the case of *Wilson v. Merry*, decided in the English House of Lords, in May, 1866, and reported in the Law Reports, Appellate Series, part 3d, for July 1868, p. 326. It was a Scotch appeal in a case where a verdict had been recovered against the proprietors of a coal-mine, for the death of a party, occasioned as was alleged, by the defective construction of a scaffold in the mine. Without recapitulating the facts, it may be sufficient to state that the case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic or foreman, superior in grade to the injured employee. Opinions were given by the Lord Chancellor, Lord *Cairns*, and by the ex-Chancellors, Lord *Cranworth* and Lord *Chelmsford*, all substantially concurring in the conclusion, that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment ; and when he had done that, he had performed his whole duty. In the course of his opinion, Lord *Cairns* says : “ The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master, in that which he the master has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business ; but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work.” He adds : “ If the persons so selected are guilty of negligence, this is not any negligence of the master ; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman ; skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is not liable, although the two cannot technically be described as fellow-workmen ; negligence cannot exist, if the master does his best to supply competent persons. He cannot

warrant the competency of his servants." The case is very instructive, as containing the latest utterance of the highest court in England, and the opinions of all the learned Lords maintain, with great distinctness and force, the principle of liability which I have endeavored, as well as I was able, to illustrate and enforce in the foregoing opinion, and which should, I think, govern in the disposal of this case.

The judgment should be reversed, and a new trial granted, with costs, to abide the event.

Judgment accordingly, five judges concurring therein.

POWER OF CORPORATIONS LIMITED BY CHARTER. DIRECTORS HAVE SAME POWER AS CORPORATION, UNLESS RESTRICTED BY CHARTER OR BY-LAWS.

Pearce v. Madison and Indianapolis Railway Company et al., 21
Howard's (U. S.) Reports, 441.

Two railway corporations chartered respectively to do all that is necessary to construct and put in operation distinct lines of railway between cities named in their charter, and connecting at a certain point, have no authority to consolidate these corporations and place both under the same management, or to subject the capital of the one to answer the liabilities of the other.

Nor have they a right to purchase a steamboat line to run in connection with the railways.

And promissory notes given by the managers of the consolidated line for the purchase of a steamboat cannot be recovered upon.

OPINION.

MR. JUSTICE CAMPBELL. The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that state. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations (defendants), some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis, and Peru Railroad Company, and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio River, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the circuit court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the Legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor v. The Official Manager of the Deal & Dover Railway Co.* (16 L. & Eq. 180), it was considered that a railway company incorporated by act of parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of parliament, must be taken to be known to the whole world. In *Coleman v. The East-*

ern Counties Railway Co. (10 Beav. 1), Lord *Langdale*, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord *Langdale* said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

"There is, however, no authority for any thing of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of parliament, under which those acts were done, they furnish no authority whatever. In the *East Anglian Railway Company v. The Eastern Counties Railway Company* (11 C. B. 803), the court say the statute incorporating the defendants' company gives no authority respecting the bills in parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Company* (2 Cr. 127), and has been reaffirmed in a number of others that followed it. (*Bank of Augusta v. Earle*, 13 Pet. 519; *Perrine v. Ches. & Ohio Railroad Company*, 9 How. 172).

It is contended, that because the steamboat was delivered to the

defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Judgment affirmed.

In *Rutland and Burlington Railway Company v. Proctor*, 29 Vt. 93, where the plaintiffs, a railway company, chartered with the usual privileges and limitations, in order to compete in business and improve the profits of their road, in all probability in good faith, purchased the boats and appurtenances of a corporation formed for carrying freight and passengers on Lake Champlain, and subsequently sold one of these boats and furniture to the defendants, and after the sale repaired the boat and furniture at a machine shop purchased of the transportation company, and brought an action for such furniture and repairs, it was held that they could recover. The court, *Redfield*, C. J., said: "The defence is, that the contract of purchase by which the plaintiff's company acquired the title of this boat and furniture, sold the defendants, and of the shop at which the repairs were done, was beyond their powers, or as denominated in the books, *ultra vires*. It does not appear that the stockholders of the plaintiffs' company have ever objected to their making the purchase, or running the boats in connection with their road.

"If we regarded the question properly before the court for determination, we should not at first view certainly, be inclined to question that such a purchase is beyond the powers of the company. And if the stockholders had applied to a court of equity at the time, to have the directors enjoined from making the purchase, the current of English decisions would probably have justified the injunction. And possibly had the state interfered by way of *scire facias* or *quo warranto*, the excess of power thus exercised by the company, might be regarded as sufficient reason for revoking their charter. We say this may possibly be so regarded, but it is not common in practice for the courts to declare the forfeiture of a railway charter when the directors have proceeded in good faith, and the property of the company is not brought in peril, but no such step has been taken, nor is this an action by which the company are sought to be charged for a contract beyond the fair scope of their charter.

"The defendants seek to make this defence upon the ground that the excess of power thus assumed by the company is illegal, and renders all contracts connected with the transaction inoperative by reason of such illegality.

"If there had been a positive prohibition of entering into a particular class of contracts, and especially if such contracts had been declared void by the charter of the company, or the general laws of the state, most unquestionably no action would lie upon the prohibited contract.

"But when no such prohibition exists, and it is only by construction of the char-

ter that a class of contracts are declared to be beyond the powers of the company, and when upon this point there is such reasonable ground of doubt as to induce a court to suppose the directors may have acted in good faith, and where the question is raised by one having no interest in it, except for purposes of unjust advantage, courts have never been inclined to listen to the objections.

“ In the present case, the most favorable view for the defendants, as it seems to us, is that the directors of the plaintiffs’ company exceeded their powers in making the purchase, and that therefore the title of the boats and apparatus did not vest in the company, and consequently that the funds which the directors appropriated for the purpose, were misappropriated, and the directors may be compelled to account for them to the company, for the benefit of the stockholders. And possibly the funds so misapplied might have been pursued into the hands of the transportation company by showing the insolvency of the directors; but this must have been done at once, and any considerable acquiescence in the transaction will prevent the stockholders or the company from pursuing the funds. And in that case the title to the property will have passed from the transportation company, *prima facie*, into the directors as natural persons. In such a state of the title the directors might most undoubtedly dispose of the property, and collect the avails as a legitimate mode of restoring the funds misapplied to the company. And for this purpose they might most unquestionably take the securities upon sale of the property, payable to the company, or stipulate that the purchaser should pay the company. And this, so far from being a continuance of the perversion of the charter powers, is the surest and only obvious mode of restoring the funds to their proper channel.

“ The only wrong in the directors is in having exceeded their powers, and the transaction with the defendants, so far as it goes, will tend to restore a portion of the money to its rightful proprietor; and of this the defendants ought not to complain, as they are confessedly solicitous to bring the directors of the plaintiffs’ company back to their legitimate functions. And if they should dispose of all the property purchased in this mode, in the manner this is sold to the defendants, it will go far to restore them to their appropriate place, — the treasury of the plaintiffs, — for the benefit of the company and its stockholders.”

CORPORATE TRUSTS.—DUTIES OF RAILWAY DIRECTORS AND OTHER OFFICERS.

Sturges et al. v. Knapp et al. and The Troy and Boston Railway Co.,
31 *Vermont Reports*, 1.

THE Western Vermont Railway Company executed a mortgage, in the ordinary form of their railway and franchise, to secure the payment of their first issue of bonds, being five hundred in number, and amounting to four hundred thousand dollars. This mortgage was made to K. and B., as trustees for the bondholders, and con-

tains no provisions in regard to the rights or duties of the trustees, either before or after foreclosure. In consequence of a failure to pay these bonds, this mortgage was foreclosed, and a decree, in the ordinary form, was made, simply decreeing that, if certain specified sums were not paid on or before certain specified times, the mortgagors should be foreclosed from all equity of redemption in the mortgaged property. One of these payments, becoming due January 1, 1857, was not made, and the title thereby became absolute in the trustees. The bondholders, at that time, had no legal organization, but were very numerous, and resident in different parts of the country, some of them being under legal incapacity to act, neither did the trustees fully know who they all were. The trustees had no rolling stock for the road, nor any means of purchasing any. Immediately on the expiration of the decree, the trustees requested C., who had previously been running the road under the receiver of the court of chancery, pending the foreclosure suit, and who owned rolling stock, to continue running it for a short time, until definite arrangements could be made, which he accordingly did, until the execution of the lease hereinafter mentioned. On the 9th of January, 1857, certain persons, authorized by the plaintiffs, and claiming to represent bondholders, — the number or names of whom, however, were not mentioned on the one side, or inquired for on the other, — in behalf of themselves and other bondholders, requested the trustees not to lease the road, until the views of the bondholders could be ascertained, at a meeting to be called for that purpose. On the 16th of January, 1857, the operation of the road by C., in the mean while, having resulted in a loss, the trustees leased the road to the Troy and Boston Railroad Company, a corporation created by the State of New York, and owning a connecting road, for ten years from that date, at a specified rent of twenty-five hundred dollars per month for the first year, and three thousand dollars per month for the remaining time, payable monthly, in advance, with a provision for the termination of the lease, in case of a neglect to pay the rent for ten days after it became due, and a covenant, on the part of the lessees, to return the road, at the termination of the lease, in as good condition and repair as it was then in, natural wear only excepted. The lease also provided that, if a majority, in amount, of the bondholders should, within ninety days from the date of the lease, unite in giving notice, in writing, to the lessees, of their desire to

terminate the lease at the expiration of one year from its date, then the lease should so terminate, and be valid only as a lease for one year. The lessees went into immediate possession of the road, and, within ninety days from the date of the lease, a committee, representing the holders of a majority of the bonds, gave them notice, that they denied the powers of the trustees to make the lease, and that they repudiated the same, and held the lessees as trespassers in the use of the road. The lessees, however, still retained possession of the road, and in May, 1857, the plaintiffs, who held bonds to the amount of one hundred and twenty-one thousand dollars, brought a bill in chancery against the trustees and the lessees, in behalf of themselves and all other bondholders, who should come in and assist in the prosecution of the bill, setting up the greater part of the foregoing facts, and praying for a decree that, after the foreclosure, the trustees had no right to make any disposition of the road, except to convey it to the bondholders, and that the lease to the Troy and Boston Railroad Company was null and void, &c. But the court decided otherwise, — *Barrett, J.*, dissenting, — and ordered the bill to be dismissed; and, *Held* :

1. That the trust conferred upon the trustees by the mortgage was after the breach of condition, and before foreclosure, not a *dry, naked trust*, but entirely an *active and fiduciary one*; that they could not then have surrendered the trust to the *cestuis que trustent*, and that they were not in any condition to obtain counsel from them.
2. That the foreclosure of the mortgage did not materially change the nature of the trust, and that it still necessarily continued their duty to control and manage the road, as trustees, for the benefit of the *cestuis que trustent*, in such a manner as a prudent and experienced owner would adopt, under all the circumstances, taking into account the nature of the property, the public demands upon those who should operate the road, and the duty of securing the greatest permanent return to the *cestuis que trustent*; and that this duty of management and control would continue until they were discharged by the court of chancery, or by the *unanimous and legally binding* consent of the *cestuis que trustent*, or until the latter acquired some legal organization, and a capacity to act through a majority.
3. That, as the trustees could not consult the entire body of the *cestuis que trustent*, and, as their duty was due to the bondholders severally, they were not at liberty to follow the advice or wishes of the majority, being still liable to the minority for a faithful administration of their trust.
4. That, as they had no rolling stock and equipment, and no means of purchasing any, they could not be required to attempt to operate the road on their own account, except as a matter of strict necessity and practicability; that they would naturally elect between hiring their equipment, on the one hand, and, on the other, leasing the road to a company owning a connecting line; that the loss resulting from their short experiment just made, in the former course, naturally and properly led them to lease their road as they did, and that such disposition of it was reasonable and prudent, and the rent reserved advantageous.

5. That the provision in the lease, in regard to repairs, imported that the road was to be kept in good running condition, at the expense of the lessees, during the term, and to be returned to the lessors in that condition; and that this provision secured to the lessors all that could be asked or desired in that respect.
6. That the length of the term, ten years, with the condition of defeasance at the end of one year, by notice to that effect, from a majority, in amount, of the bondholders, was not unreasonable. But, if the lease contained no provision whereby it could have been terminated, by the legal agency of the *cestus que trustent*, in some short but reasonable period, at the beginning of the term of the lease, it would wear a very different aspect, and might have been regarded as somewhat more questionable, so far as the power of the trustees is concerned.
7. That, as the bill was brought before the expiration of the first year of the term, the question, as to the effect of the notice, from the majority of the bondholders, to the lessees upon the lease after the first year, was not before the court.
8. That, inasmuch as the statute of this state enabled those having control of railways in Vermont, to lease them to other companies, owning roads connecting with them at the line of the state, the orators could not object to the want of authority in the Troy and Boston Railroad Company, by virtue of their charter, to take the lease, so long as the State of New York, and those interested in that company, had taken no measures to interfere with or avoid the lease.
9. That the lease could not be avoided on the part of the lessors, or those they represented, on the ground of any informality in its terms, or unreasonableness in its provisions, unless a case were shown of want of power; that the contract is *ultra vires*.

All trusts depend much upon the implications growing out of the state of the property, the purposes desired to be accomplished, and the mode provided for that end. This is true, to a great extent, of all contracts. It is only by means of the constructive additions and limitations, imposed by courts, that a brief memorandum of a contract is ever made to speak truly and fully the mind of the parties. *Redfield, C. J.*

But upon no subject is there so much demand for the exercise of construction, and of judicial implications, as in regard to trusts; and especially trusts of the complicated and public character of the one under consideration in this case. And these implications and constructive additions are not less a part of the contract than its more express provisions. *Redfield, C. J.*

All corporate action, as well as that of the directors and agents as of the corporation itself, is but a succession of trusts, in regard to which the creditors of the corporation, in the order of their priority are the primary and the shareholders the ultimate *cestuis que trustent*. *Redfield, C. J.*

It is well settled that trustees are not to be removed from part of their trust, leaving them burdened with, and responsible for, the remainder; nor will such a trust be discharged until fully performed, or the *cestuis que trustent* are in a condition to manage it themselves. *Redfield, C. J.*

OPINION.

REDFIELD, C. J. This bill is brought by the plaintiffs, holding a majority, in amount, of the bonds secured by the mortgage of the Western Vermont Railway, executed to Knapp and Briggs, as trustees for the holders of the bonds, praying a decree, that Knapp

and Briggs, after the foreclosure of the mortgage, held no estate in the premises conveyed, except a mere nominal, naked, or dry trust, for the sole benefit of the *cestuis que trustent*. In other words, that the trust did not impose any functions or duties whatever, except to convey the estate to the *cestuis que trustent*; that it was a naked use of the character, which the statute of Henry VIIIth would have executed, without the formality of a conveyance; and, as a consequence thereof, that the contract of lease, made by Knapp and Briggs, to the Troy and Boston Railway Company, may be declared void, and an account taken of the profits made by the railway company, a receiver appointed, and the sum found due decreed to the plaintiffs and their associates.

1. The first, and the great inquiry in the case is, in regard to the nature of the estate in the trustees, created by the mortgage, the forfeiture, and the foreclosure.

It is obvious that the estate must depend very much upon the implications growing out of the relations of the parties, and the duties consequent thereon; and that these may change, from time to time, as circumstances change. That which begins as an active, responsible, and fiduciary trust, may, by lapse of time, and intervening relations, become merely a naked, dry trust, and *vice versa*. The nature and character of all trusts depend, almost exclusively, upon the implications growing out of the state of the property, the purposes desired to be accomplished, and the mode provided for that end. And it is one of the most important, and, at the same time, one of the most delicate and difficult offices of a court of equity, to raise these implications, with wisdom and justice, so that the full purpose and object of the trust shall be effected, without violence, or forced construction of the instrument under which the trusts are created.

All contracts are, more or less, subject to implications, constructive additions, and implied limitations. These are the powers by which courts, in matters of contract, are enabled to make a brief memorandum, which does not express one-tenth part of what is intended, speak truly and fully the mind of the parties. These limitations and implications must indeed be conceived in the spirit of liberal, wise, and far-sighted circumspection, or they will be liable to become a terror to all just sense of uprightness and fair dealing. Herein consists the power and the wisdom of courts of justice in the administration of civil jurisprudence, in making shreds and

fragments, and even finesse and indirection sometimes, subserve the ends of fair dealing and justice. It is to be expected that some cynical sneers will sometimes be heard, with reference to these implications and constructive additions, both as to contracts and statutes, either in more or less of the spirit of seriousness and complaint, or of badinage and pleasantry, or both, perhaps. But still the process must go on, so long as human imperfection and cultivated society, with its manifold and complicated relations, continue the same they now are. It is not impossible that every case, which occurs in a court of justice, may give occasion for the exercise of something of this function of judicial construction.

But upon no subject is there so much demand for the exercise of construction, and of judicial implications, as in regard to trusts, and especially trusts of this complicated and public character. And these implications and constructive additions are not the less a part of the contract than its most express provisions.

There are extensive trusts connected with the whole subject of corporate action, which come under the class of what in the books are denominated constructive or implied trusts. In one sense the corporation itself is a mere trustee, holding all its funds, and all its powers and franchises, in trust for the shareholders, who are the ultimate *cestuis que trustent*. So, too, the directors of a corporation are mere trustees, holding their office and performing their functions strictly as trustees, for the benefit, ultimately, of the shareholders, and directly, and primarily, of all having claims against the company.

The persons to whom these mortgage bonds are payable have not only the express trusts to perform, which are created by the terms of the deed, under which they are made trustees, but they are also constructively trustees (after the forfeiture, and taking possession of the road, which they may always do after condition broken), for subsequent encumbrancers, for the corporation, and ultimately for the shareholders themselves.

But it is not with these classes of constructive or implied trusts, that we are chiefly, at present, concerned. It is with the express trusts, created by the terms of the deed, when construed and expounded by the attending circumstances, and the reasonable implications, and necessary limitations, that we have to do at present.

We cannot, of course, go much into detail here upon so exten-

sive a subject as that of the construction of powers, and executory or active trusts. The books are filled with cases of this class, involving interests of the greatest magnitude, and where the terms of the deeds, or instruments, by which the trusts were attempted to be created, were deficient, in all specific definition, of the purposes expected to be accomplished, and especially in regard to the mode of its accomplishment. In all these cases, the courts of equity have not scrupled to carry out the apparent purpose of the contract, in the mode most consonant with the terms used, as interpreted by the known and obvious rules of construction. We shall not stop to discuss a class of cases so numerous, and all tending to the same result, the accomplishment of the apparent and obvious purposes of the contract. We proceed at once to the consideration of the nature of the trust, created in the case before us.

And it will scarcely require distinct enunciation here, that, in entering upon a subject so new, so difficult, and where the consequences of mistake are likely to be of such importance to the state and its citizens, we have attempted to proceed with reasonable caution and circumspection; and, at the same time, fairly to meet the emergency, without shrinking from its weight or responsibility, deeming it of the last moment, that, upon such a subject, we start, if possible, in the right direction, and with a just comprehension of the interests at stake.

We think it could scarcely escape the notice of any one, who had seriously and patiently attempted to master this question, that, until the actual foreclosure of the mortgage, the trusts involved in the contract, and imposed upon the trustees named, are entirely fiduciary and executory. At first, and so long as prompt payment is made, it is understood, in practice, indeed, that the office of such trustees is rather silent, and the duties of the trustees, by means of the negotiability of the bonds, and of the coupons attached, are ordinarily performed, or expected to be performed, by the corporation or its officers. If the interest in the coupons, and the principal, as it falls due, are promptly paid by the corporation, so that no forfeiture occurs, it will never become of sufficient importance to consider the question, what is the precise nature of the trust created by the contract in the first instance.

But, after the forfeiture occurs, either by non-payment of interest or principal, or both, as in the present case, the duties of the

trustees become, not only active and responsible, but critical and delicate. It not only is not a dead, dry trust, but is one of the most active and momentous responsibility. We presume no man, who had ever been placed in such position, and who had any proper sense of his position, would ever think of regarding or treating it as, in any sense, a trust of a nominal or indifferent character. It is not a dry trust at this point certainly, or, if so, it is not in the sense of the books; if so, in any sense, it is not so in regard to its duties or responsibilities.

The trustees must then elect between delay and action; between, on the one hand, taking possession of the road and its fixtures, and thereby assuming, at once, the vast public and private burdens and responsibilities of a great public work, forming, perhaps, a necessary link in some great thoroughfare; and, on the other, delay, and consequent further embarrassment, complication, and loss; or they must undertake the ulterior and final remedy of foreclosure. And those persons, if any such there be, who could regard the discharge of such a trust, to be exercised in the face of such alternatives, as any formal or nominal affair, have certainly yet much to learn in regard to the nature of this business. For, at this point, it will not be assumed, that the trustees could have surrendered the trust to the *cestuis que trustent*, or that they were in any condition to obtain counsel from them. It was the sole, or the first purpose of their office, that they should act, and should exercise their wisdom and discretion upon the possible occurrence of this very emergency. They were selected, doubtless, with reference to their capacity and responsibility for this very contingency, both by the corporation and the *cestuis que trustent*, and neither of these parties had stipulated to deal directly with the other, but only with the trustees, as the responsible party. This duty they must meet and perform. This they did do.

The next inquiry is, whether their functions ceased upon the foreclosure? When we look at the position of affairs at this time, it seems difficult to come to any such conclusion. The powers and duties of the corporation, in regard to the road and its franchises, under such a mortgage and foreclosure, must be regarded as effectually terminated for all practical purposes. The trustees, and the *cestuis que trustent*, one or both, had effectually become the corporation, or had acquired all its essential rights, and assumed all its duties, so far as the public was concerned. And these were im-

portant and pressing. Delay, for the shortest interval, might be attended with disastrous consequences to the continuance of the franchise even, and must be so, in every view, to the interests of the *cestuis que trustent*. The road could not, in strict propriety, be allowed to stop for a single day; and it could not be allowed to cease operation for any considerable time, with any safety to the interests of those to be affected by the depreciation of the property, and the intervention of counter interests and influences.

The *cestuis que trustent*, the holders of these bonds, were a changing, unorganized body, having no common bond of union, and no recognized principle of action, unless by unanimity of consent, which is practically impossible. It would not be expected, under such circumstances, that there should be an immediate surrender of the property to this heterogeneous and chaotic mass of men, women (single or married), and infants, many of whom were under such disabilities, that they could not act for themselves, and where consequent delay must ensue in providing the means of obtaining their consent, in a legal form, which must be fatal to the enterprise. All this must be regarded as in the contemplation of the parties at the time of entering into the contract, by which the bonds were issued. It must be so regarded in looking for the true construction of the contract, for in that we are attempting to obtain the mind and will of the parties, at the time of making the contract, in regard to the state of facts, which has now intervened; and it will, perhaps, fairly test this, to ask ourselves, what would have been their probable response had the inquiry then been put to the parties, What shall be done with this property, and how shall it be managed, in case of foreclosure? Shall the trustees continue to manage it, for the time being, and until the order of the court of chancery, as in the case of other trusts? It seems to us there can be but one response to this question. The trustees seem to have been selected for this very office, among others, of controlling and managing the property, in case of forfeiture and surrender, *as trustees*, for the benefit of the *cestuis que trustent*, in order to make it available for the payment of the bonds, both interest and principal. This must be so, until some organization of the bondholders, and the acquiring of some capacity to act, by a majority, or in some such way, as to enable them to discharge this new class of duties thrown upon them, by the forfeiture of the condition of the mortgage, and the surrender of the road, with its incidents and fixtures.

After the surrender, and before foreclosure, as we have before intimated, while the control of the road, for the benefit of the bondholders, might fairly be presumed to be temporary, it could not, with the least show of propriety, be expected that any change in the principle of their mode of action should be attempted. Any one, who accepted the office of trustee, under a contract of this character, must be supposed to look directly at the reasonable probability of the occurrence of this contingency, the failure to pay promptly, and to have assumed his position with reference to the new duties resulting from the occurrence of such contingency, and would, consequently, be bound to perform the duties arising from it. And all the other parties in interest, the bondholders, the creditors of the corporation, in the order of their priority, the corporation itself, and, ultimately, the shareholders, will have a vested interest in having these duties performed by such trustees, under the security of their responsibility and capacity, both pecuniary and personal. And we do not well perceive how they can be relieved from this responsibility, except by the decree of the court of chancery, who alone have the legitimate control over such matters.

And it is well settled, in the court of chancery, that trustees are not to be removed, or discharged, from part of their trust, leaving them burdened with, and responsible for, the remainder. *Goodson v. Elliason*, 3 Russ. 594. Nor will such a trust be discharged until fully performed, or the *cestuis que trustent* are in a condition to manage it themselves. Nor will trustees be changed, except for sufficient cause, affecting the faithfulness and capacity of the trustee, or the interest of the *cestuis que trustent*, or, perhaps, on account of the public interest, which is extensively concerned in trusts of this character. These are but elementary principles, in the law of trusts, familiar to every one the least conversant with the subject, and will be found distinctly laid down in the elementary treatises upon the subject.

And a trustee, once having assumed the office, is morally and legally bound to continue in the performance of its duties, until discharged by the order of the court of chancery, or the unanimous consent of the *cestuis que trustent*, which, in a case of this kind, where there are, of necessity, always more or less of infants, married women, and others, under disabilities, incapacitating them to act personally, or in any way effectually, except through the guar-

dianship of the court of chancery, is morally impossible, and practically so, except through the agency of a court of equity.

So, that before the actual foreclosure of the mortgage, there can be no question whatever, that the trustees are the only responsible party, in regard to the management of the property.

And, after the foreclosure, it seems to us, that, although the contingent interests are mostly cut off, and the number and character of the ultimate *cestuis que trustent* very much changed, — reduced in number, and simplified, in regard to their interests, — the duties of the trustees, and the necessity of their continuing to act, remain much the same.

The necessity of immediate and efficient action is precisely the same, and so is the difficulty or impossibility of accomplishing it through the *cestuis que trustent*, and the utter ruin to the interests at stake, in consequence of any considerable delay, is none the less imminent. There would, therefore, seem to be a duty remaining in the trustees, to manage the property for the benefit of the *cestuis que trustent*. And this duty is to be estimated by the surrounding circumstances, and what a prudent owner would esteem reasonable under these circumstances. We do not say they are to perform this duty permanently, but they must do it until they can be legally exonerated.

II. And this duty must be performed in a manner to meet all the incidents of the case, taking into account the nature of the property, the public demands upon those who operate the road, and the duty of securing the greatest permanent return to the *cestuis que trustent*. And not only the nature of the property, but the extent of the equipment, included in the mortgage, and which comes to the trustees, must be considered.

We have, then, in the present case :

1. An entire road, of more than fifty miles in length, with no adequate equipment whatever. And, if the equipment were perfect, it is questionable how far the trustees are bound to assume the burden, or responsibility, of personally operating the road, farther than results necessarily from the fact, that the legal title is in them, and that the public have no other party to look to in the first instance. But, as they had no equipment in this case, it would not be expected they should attempt to purchase one. Under such circumstances, we might expect prudent managers to look either to a lease to some party owning a road in connection,

and having sufficient rolling stock to operate both roads, or to some other party having rolling stock, the use of which could be secured at a reasonable rate. Both of these modes were practicable in the present case. But it would seem, that the one which the trustees elected was preferable, as imposing less risk, and promising more return, especially after the short experiment made by the trustees, of attempting to operate the road, by means of agents, with hired rolling stock, which produced a loss of some thousands of dollars in a few days.

2. This road was part of an important thoroughfare in the state, affecting transportation and travel to a large extent, thereby making it the duty of the public authorities to insist upon the strict and faithful performance of its public functions and duties. There were, also, rival lines of transportation and travel, whereby it became important to the interests of the *cestuis que trustent*, that the operation of the road should not be suspended, for even the shortest period of time, as such suspension would destroy confidence in its permanent efficiency, and produce a diversion of traffic, which could not fail to be seriously injurious to the interests of the *cestuis que trustent*.

3. It was a species of property which could only be made remunerative by placing large interests, and long lines of communication, as far as practicable, under unity of control and management.

4. They could not consult the entire body of *cestuis que trustent*, and their duty being due to the body severally, they were not at liberty to follow the advice or wishes of the majority, as they were still liable to the minority for faithful administration. And, in showing this, the advice of the majority would be no more conclusive in their favor than that of others, equally skilled and equally interested in the question. Having assumed the duty of faithful administration of the trust, in behalf of the several owners of the bonds, they were not at liberty to shield themselves by any thing short of showing the fact of such administration, or that they were excused by the owners' unanimous consent from the performance of their duty under the trust.

5. They must act without delay, and under the responsibility of being made liable for a breach of trust, if they failed to act in time, or to act with proper discretion, wisdom, and forecast.

6. It was a trust of a character so entirely new, that very little

light could be gained from any analogy to other trusts. Even the right of the trustee of real estate, held for the support and benefit of the *cestuis que trustent*, where the right to lease for twenty-one years, or even for a much longer term, is unquestionable, could afford no satisfactory guide in a case like the present. There is a very essential difference between land and buildings, even where comparatively small repairs are required, to maintain them in tenantable condition, and a railway, where heavy expenditures are requisite from day to day. So that the powers and duties of trustees, in regard to lands and buildings, and other real estate of that kind, are not, in any just sense, a guide for trustees of the character now under consideration.

Under all these circumstances, the question presents itself, as it occurred to the mind of the trustees at the moment of the foreclosure. They would naturally try, as they did, the temporary expedient of operating the road on their own account, if the thing were practicable, as the test of this mode of administering the trust. This, we think, proved so disastrous, that the trustees ought not longer to have continued it, if any mode presented itself whereby they could exempt themselves from loss, and especially if gain could be secured. The leasing the property to some connecting road was obviously the most hopeful expedient practicable.

And, it seems to us, that the rent secured in the present case is quite as good as could reasonably have been expected. The wonder is, that the Troy and Boston Company could afford to pay so high a rent. The other conditions of the contract are not objected to, with the exception of two.

1. The provision in regard to repairs and renewals. This, it seems to us, must be regarded as sufficient. We are to understand this provision, as we do all the provisions of this, and of all contracts, with reference to the general purposes and objects of the contract, and what it is reasonable and natural to expect under it. We are not to suppose, that the lessees will cease operating the road, during the whole, or any considerable portion of the term, and then pay the rent, and perform the covenant in regard to repairs. The very supposition is little short of absurdity. It could not be done short of renewing the entire perishable portion of the superstructure of the road. The covenant is, that the lessees shall "return said road and property, both real and personal, at the

termination of this lease, in as good condition and repair, in all respects, as it now is in, natural wear only excepted."

This covenant, construed with reference to the subject-matter of the contract, and its other stipulations, imports, that the road is to be kept in good running condition, during the term, and returned in that condition. And all structures, which, by decay or accident, become unsafe for use, must be renewed at the expense of the lessees. This, every one conversant with the subject must understand, is a very onerous covenant, and one which secures to the lessors all that could be asked or desired.

2. The length of the term is objected to. But, with the condition for defeasance, which this lease contains, enabling the parties in interest, — a majority, in amount, of the bondholders, — to terminate it in one year, by notice to that effect, we cannot regard the length of the term, ten years, as being unreasonable. It is well known, that a favorable lease, for a much shorter term, could not reasonably have been expected to be offered by any connecting road. It requires a considerable time to bring these extensive works into such a train of operation as to be made remunerative. Experienced directors would not venture upon a term which, if it went beyond a few months, did not extend over a considerable number of years. And, as this is a case where there is no reasonable probability that the bondholders would attempt to operate the road themselves, without an essential modification of their principle of action, through some definite organization, which certainly could not speedily be effected. As the law then stood, it would seem that the contract secured to them all that was desirable, in regard to the shortness of the term. A longer term would, in fact, no doubt, have been far better than a shorter one for the interest of the *cestuis que trustent*.

Taking the contract, all in all, and the circumstances of the property, there has never been any question, in our minds, that the contract must be regarded as a provident one, a very desirable one for the *cestuis que trustent*. And, if it were less so, we know of no principle of chancery law, by which it could be set aside, in a court of equity, upon any such grounds, short of making a case, where the lessors had exceeded their powers, in assuming to enter into the contract.

It seems to be now well settled in the English courts, that railway contracts, and, indeed, all contracts by corporations, are not

to be held invalid, for any omission in the detail of preliminary proceedings, or in the provisions of the contract, unless the contract itself was *ultra vires*. In such case, where the lessor has not the power to enter into the contract of lease, and the extent of such power is open equally to the knowledge of both parties, the lessee is bound to know the fact, and it is regarded as virtually bad faith to accept a contract, where the other contracting party acted in a fiduciary relation, and which he had no power to execute. And it is upon this ground that the plaintiff proceeds, both in the bill and the argument; and we regard it as the only ground upon which the plaintiff's case can be supported.

The proposition, of the want of power in the lessees to accept such a lease, which has been so much labored in argument, does not seem to us available on the part of the orators. The defendants, and their creditors, and shareholders, have, and do acquiesce, in the contract. It is one which, by the express provisions of our statute, it is competent for those having the control of Vermont railways to make with railways out of the state, connecting at the line of the state with such roads. And, as it is a vexed question among those learned in the laws of New York, how far the statutes of that state have authorized the defendants, the Troy and Boston Railroad Company, to accept such contract, we think it is not competent for the plaintiffs to claim any advantage on this ground, until the State of New York, or those interested in the Troy and Boston Railway, interfere. This principle has been repeatedly recognized in this state by this court. *Noyes v. Rut. & Bur. Railway Co.*, 27 Vt. 110; *Rut. & Bur. Railway Co. v. Proctor*, 29 Vt. 93.

In regard to the validity of the mortgage, nothing need be said. Both parties claim under it, and, consequently, are not in a position to raise that question; and, if they were, it would not seem there could be much question in regard to it.

The view we have taken of the case renders it unnecessary to examine the other points raised in argument. Neither are we called upon, at this time, to give any intimation in regard to the action of the majority, in amount, of the bondholders, and whether it had the effect to terminate the lease. This bill was brought before the first year terminated, and does not, of course, base itself upon such ground. We could, therefore, only decide the case upon the grounds made in the bill, and other pleadings.

It will be perceived that the lease, in this case, was made before any statute existed in this state, enabling the bondholders to organize themselves into a corporation, which will apply, of course, to contracts made after the law came in force; and we do not intend to intimate any opinion here, how it might have affected the present case, had it existed at the time of the foreclosure. The lease containing a power of revocation during the first year, by which its operation was limited to one year, if this power, thus reserved to the bondholders, was not exercised, it was, of course, by their own acquiescence and consent, that the lease was extended beyond one year. And, if that power was exercised, the lease was, in effect, a lease but for one year.

It may be proper to add, that, if the contract, in this case, had contained no condition, whereby it could have been terminated by the legal agency of the *cestuis que trustent*, in some short but reasonable period, at the beginning of the term of lease, we probably might have regarded the lease as somewhat more questionable, so far as the power of the trustees is concerned. It is certain such a clause of revocation was highly prudent and proper, and the lease, without this provision, would wear a very different aspect, and, perhaps, merit a different consideration.

A majority of the court think the decree of the chancellor should be reversed, and the case remanded to the court of chancery, with instructions to dismiss the bill, with costs, making such other orders in the case as may be required to preserve the interests of all concerned.

Barrett, J., dissented from the opinion of the court. *Bennett, J.*, dissented from so much of it as affirmed the right of the trustees to make a lease for so long a period as ten years, but concurred on the other points, and in the judgment.

THE POWERS AND DUTIES OF RAILWAY CORPORATIONS IN OPERATING THE LINES OF OTHER COMPANIES, AND ALSO OF THE LATTER COMPANIES WHILE SO OPERATED BY THE FORMER.

Bissell v. The Michigan Southern and Northern Indiana Railway, 22 *New York Ct. Ap. Reports*, 258.

Where two corporations, which were chartered, one by the State of Michigan and one by the State of Indiana, each authorized to build and operate a railway in its own state, united with a third company in Illinois, and built a railway in that state and operated the three roads jointly, the three corporations were held jointly liable for injuries to a passenger resulting from the negligence of their employees.

The doctrine that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances, denied. *Comstock*, C. J.

A corporation is not an agent of the state or in any strict sense of the shareholders. It may transcend its chartered powers for purposes which in themselves considered involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal because they violate no public interest or policy. *Comstock*, C. J.

Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. *Selden*, J.

Doctrine of *ultra vires* discussed and its limitations defined. *Comstock*, C. J., and *Selden*, J.

Remedies of shareholders for abuse of corporate powers. *Comstock*, C. J.

OPINIONS.

COMSTOCK, C. J. A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that dur-

ing the transit he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts, because one of the companies was chartered by the legislature of Michigan, with power to build a road in that state, and the other by the legislature of Indiana, with power to build one in that state. They both insist that they had no right or power under their respective charters to consolidate their business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid. Their defence is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can then two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest: charter another connecting road in furtherance of the same policy: hold themselves out to the public as carriers over the whole route: enter into contracts accordingly: receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defence is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are

claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest, denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view, these artificial existences are cast in so perfect a mould that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons.

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against

agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventure may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result.

It is not uncommon, in charters of corporations, to lay express prohibitions upon them as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the state. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground the law has always denied to them its remedial processes either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power. In the case of *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company*, 7 Wend. 31, it was contended that a certain corporate transaction, if unlawful, was to be regarded as the act of the agents or officers of the company, and not of the company, and, therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice Sutherland in this language: "This would be a most convenient distinction for corporations to establish—that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could

be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can and do perform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the state interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error in reasoning upon legal as well as other questions, is, inexactness in the use of language, or perhaps in the imperfectness of language, to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory. The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the state, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense, natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through which it may be exerted in modes of

action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed, in which this doctrine of corporate exemption from liability could not be defended upon any rule of reason or principle of justice. But perhaps none of them would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors in whom were vested every power, faculty, or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals; because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers with the public, and the entire business of both companies was thus conducted for a period of several years, with no complaint on the part of the state sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, where were these companies and what were they doing during all this period? The question would be the same if that mode of conduct were to continue without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are in all circumstances to be imputed to the agents who perform them, the conclusion follows, that the corporations became virtually extinct by a nonuser of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus practically, if not legally, ceased to exist. If it was the business of the directors as natural persons, then those persons must be deemed not only to have taken a wrongful possession of all the estate and funds of the corporations they professed to represent, but also to have usurped their franchises, and to have stolen their corporate names and seals. If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of incorporation

passed by the legislatures of Michigan and Indiana, then the companies might have been proceeded against by those states, not on the ground of a usurpation of powers and privileges which did not belong to them, but for a total nonuser of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents for usurping corporate rights without any charter at all. (16 Wend. 655; 23 id. 193; 3 Bl. Com. 263.) These conclusions are not founded in any known principle or practice, and they are totally opposed to the facts of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based; and we are compelled to hold that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight under and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

But the doctrine, that corporations can never be bound by engagements not justified by the grant of power from the state, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and

the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases (*The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 7 Eng. Law and Eq. 509); *McGregor v. The Deal and Dover Railway Co.*, 16 id. 180; but it was never established, and is not now received in the English courts. *The Mayor of Norwich v. The Norfolk Railway Co.*, 30 Eng. Law and Eq. 120; *Eastern Counties Railway Co. v. Hawkes*, 35 id. 8, 37. The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school-house or a place of worship for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the state, or, in any strict sense, of the shareholders.

But it derives its powers from the state, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders ; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the state. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in ; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages ; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons

may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation, as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions, is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences.

In every treatise upon the law of contracts—and there are many of them—we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, "*ex turpi contractu non oritur actio*," can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. 2 Kyd on Corporations, 439; Angell & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf. 267. Our statute on this subject makes it the duty of the Attorney General to institute the proceeding, under leave of the court, when the case is one of public interest, but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the state. 2 R. S. 583, §§ 39, 40. In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the nonuser or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but sim-

ply one of ouster from the right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the state, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the state. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to state policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept that defence without regard to the situation and rights of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have above shown, it is a legal possibility

for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corporation are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust, 1. That such dealings are possible in law, as they often take place in fact: in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract, or dealing, on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not, universally and indiscriminately, to be adjudged void; and, especially, this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offence.

If these negative conclusions cannot be denied, it follows that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital

invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*. That term is of very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defence in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the share-holders as an excuse for the non-performance. And I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the share-holders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of share-holders will enable them, in many circumstances, to claim the affirmative interposition of the courts to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited, to prove that corporations cannot exceed their powers. *Dodge v. Woolsey*, 18 How. U. S. 331; *Rolf v. Rogers*, 3 Paige, 154; *Angell & Ames on Corp.* 424, 4th ed. and cases cited. So, too, it is plain, without citing authority, that a stockholder, who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive, and, it

would seem ample, remedies to prevent or redress the abuse of power ; and it appears to me a much higher and better policy, that the private share-holders should be confined to these remedies, than to sacrifice the interests of the rest of community by conceding to these bodies absolute immunity whenever power is thus abused. But the principles which belong to this question need not present that naked alternative. In many cases no injustice will be done by receiving the plea of *ultra vires*, when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defence, if allowed, will leave the parties substantially in the enjoyment of their previous rights. An artificial, not less than a natural person, having the title and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus penitentie*, where it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and so exact as to include every case ; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law, if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does is not always the test of liability.

It is said that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated ; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it ; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party ; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is

claimed to rest; for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was *ultra vires*, must be quite apparent.

I have examined these questions with the more attention, because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization. Besides innumerable special charters, we have general laws which impart corporate attributes to associations formed according to articles of agreement, for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession, of a corporate seal, &c., we forget that corporations are no longer confined to the exercise of public or political franchises. These commercial, manufacturing, and trading bodies are brought into relation with almost every member of the community; and I think it greatly to be desired that, in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be and is contended for in order to exonerate the defendants in this case from responsibility, it would be our duty to follow it.

But such is not the case. There are, certainly, judicial opinions, and some adjudged cases, which countenance the extreme doctrines on which the defence must rest. Among these cases, a leading one is that of *Hood v. The New York and New Haven Railroad Company*, 22 Conn. 502. That case appears to go the length of holding that corporations cannot and never do perform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is, *Pearce v. The Madison and Indianapolis Railroad Company*, 21 How. U. S. 442, where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of its powers, had entered into an engagement upon a consideration which it had received and appropriated. It was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to. But, on the other hand, there are well-considered authorities which sustain the principles advocated in this opinion. The *Steam Navigation Co. v. Weed*, 17 Barb. 378; *The Silver Lake Bank v. North*, 4 Johns. Ch. 370; *The Chester Glass Co. v. Dewey*, 16 Mass. 94, 102; *The Bank of Genesee v. The Patchin Bank*, 3 Kern. 309, 314; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 255; *Parker v. The Boston and Maine R. R.*, 3 Cush. 107, 108; *Alleghany City v. McClurkan et al.*, 14 Penn. 83; 29 Verm. 93. In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity to the prejudice of third persons?" It will be found, indeed, that such a doctrine is of very modern origin. In the case from 14th Pennsylvania, Coulter, J., observed: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability because such business was not expressly authorized in its charter.

The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators.” “One rule of law,” he adds, “is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them.” A more particular discussion of the authorities on either side, would not be profitable. The general question is one which ought to be considered on principle; and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrong-doers. If their contract was *ultra vires*, and that defence to an action upon it must be received as absolute and peremptory — if no principle of estoppel or rule of justice can be urged against that defence — then it is more clear that the simple wrong to the plaintiff’s person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established; and they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants’ express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking resulting from the actual attempt to carry the plaintiff as a passenger is encountered by the same objection; and there is nothing left of the transaction except a pure and simple tort, committed by the defendants’ servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff’s case.

But I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the termini of which were specified. They built the roads, and then consolidated their business. The common interest might thus be promoted; but it is difficult to affirm that the charter of either authorized its capital to be thus blended with that of the other. It is equally difficult to hold that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the share-holders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed. If state sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveller into their cars, and, after injuring him by their negligence, reject the responsibilities of their contract. A traveller from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J. It was not strenuously insisted upon the argument that the acts of these two railroad companies in entering into the arrangement found by the referee, and in running their cars upon joint account through the States of Ohio, Indiana, and Illinois, were authorized by law; nor have I been able to find in the statutes of those states any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from

Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint, of carelessness and negligence on the part of the defendants, or their agents, is fully sustained by the finding of the referee, the defence must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case the question arises whether want of authority on the part of a corporation, to enter into any engagement, is a valid defence to such corporation when sued for its violation.

This question has not until lately attracted much attention. But the recent rapid multiplication of these artificial bodies, and the extensive powers and privileges conferred upon them, have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts, both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions, which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion, are too obvious to need enumeration. Confidence in courts is only to be retained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and so uniformly decided that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and the American courts, rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary, is produced by substituting an entirely false basis for those decisions. If they really rested, as has been sometimes supposed, upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot by possibility

do any act beyond the limits prescribed by their charters ; and hence that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule, which exempts corporations from liability for their unauthorized acts, is entirely to misapprehend the whole doctrine on the subject.

No court has ever held that the defence of *ultra vires* rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Barry v. The Merchants' Exchange Company*, 1 Sandf. 280, will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no provision conferring this power being contained in the charter. The Vice-Chancellor, in deciding this question in the affirmative, said : " Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual*." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defence its own want of power to enter into the contract, two questions are involved : first, whether the contract was, in truth,

beyond the corporate powers ; and, second, if so, whether this is available as a defence. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to, that a corporation has no natural powers. The excess of power being established, the question, whether this constitutes a valid defence, depends upon entirely different considerations.

The assumption, therefore, that the doctrine which declares the unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done any thing but what it had a legitimate right to do, is wholly unwarranted ; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may, no doubt, err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort ; nor could they be proceeded against by *quo warranto*. The statute which authorizes the Attorney-General to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S. 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides that the proceeding may be instituted “ whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law.”

The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz., those which are *mala in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral ; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita* ; and, 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as

malum in se; and although, in this state, where we have a statute (1 R. S. 600, § 3) expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might, with much plausibility, be contended. I shall, nevertheless, concede, for the purposes of this case, that such contracts do not belong to the class styled *mala prohibita*.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business: that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter: that the charter simply takes the place in this respect of the articles of agreement in the case of an unincorporated partnership: that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust towards their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations, and of the effect of their charters. In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend, would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government to protect the people in the enjoyment of *equal* rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the fundamental principles of our government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case.

Take, for instance, the very class of corporations in question here, viz., railroad corporations, which are mere private associations, organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain, by which the property necessary for their purposes is forcibly taken from its owners as for a public use. The same is true of telegraph and plank-road incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible, for the purposes of the corporation, yet the same principle applies to all corporations; for in all some value, corporeal or incorporeal, is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public; and it would be just as reasonable, and just as logical, to contend that, under a patent for one hundred acres of land, the patentee might take possession of two hundred without infringing any public interest. Every additional power given to, or usurped by, a corporation, extends its advantages over persons unincorporated. If a bank is permitted to trade in merchandise, it comes in competition with others so employed. If a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private, unincorporated partnerships. They have large capitals and numerous agents, and are capable of entering into combinations with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the state. They are, or should be, created, as we have seen, for public reasons alone; and the legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted just so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the legislature, in expressly prohibiting corporations from exercising any powers not granted to them, 1 R. S. 600, § 3, *supra*. By making this principle of the common law the subject of an express and positive enactment, the legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto*, is in itself proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said, that the proceeding by *quo warranto* is of a purely civil

nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the Attorney-General is authorized to institute proceedings in the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases; viz., whenever a corporation shall "1st. Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or, 2d, Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, Whenever it shall have forfeited its privileges and franchises by nonuser; or, 4th, Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges, and franchises; or, 5th, Whenever it shall exercise any franchise or privilege not conferred upon it by law" (2 R. S. 583, § 39).

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and as I think conclusively, repel the idea that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by *quo warranto* for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal.

This, then, is the true foundation of the defence we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own

illegal act, as a defence to a suit brought to enforce a contract which public policy forbids ; viz., to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose ; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder ; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White*, 4 Ad. & El. N. S. 101, that for public reasons, officers so situated were not estopped ; but Lord *Denman* said, " We have held that this is true only of a statute the contents of which are publicly known ; such a statute is to have effect whatever dealings may take place ; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were after-

wards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of Doe, *ex dem.* Levy v. Horne, 3 Ad. & El. N. S. 757, will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it.

In referring to the cases which support these views, I will notice the English cases first. There are three classes of cases in England in which the question of *ultra vires* arises; viz., 1st, Cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter. 2d, Actions brought by third persons against corporations to enforce their contracts, in which the defence relied upon is, that in making the contract the corporation exceeded its corporate powers. And 3d, Similar actions, in which the defence is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed.

These three classes of cases differ materially in their nature and principles, and if we would avoid confusion, must be kept entirely distinct in investigating the subject. Those of the third class have no bearing upon the question we are discussing. There are in England a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorporation are to be effected, but leave this to be arranged by a "deed of settlement" between the incorporators themselves. By this deed, the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute, and the general laws of the kingdom. Now it is plain, that there is no analogy between an act which merely transcends the limits of this deed of settlement, and one which violates the provisions of the organic act. The deed of settlement is the private act of the share-holders; and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public

policy involved, when the question is, whether the officers have exceeded the authority conferred by this deed. The case of the *Royal British Bank v. Turquand*, 5 El. & Bl. 248, is one of this class of cases. By comparing the language of Lord *Campbell* in this case with that used by him upon another occasion, we shall obtain a clear view of the distinction here adverted to. In the case cited, the action was upon a bond signed by two of the directors, and the question was, not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the share-holders and the directors by the deed of settlement. Lord *Campbell*, in delivering his opinion, said: "A mere excess of authority by the directors we think would not amount to a defence." Of course by this was meant merely an excess of authority by the directors as the agents of the stockholders, and not an unauthorized assumption of power as between the corporation and the public.

In *The Mayor of Norwich v. The Norfolk Railroad Company*, 30 Eng. Law & Eq. 120, the same learned judge fully recognizes the distinction I take, and shows that by the remark just quoted he by no means meant to say that corporations were bound by contracts which are *ultra vires*, as between them and the public. He then says: "The mere circumstance of a covenant by the directors in the name of the company being *ultra vires as between them and the share-holders*, does not necessarily disentitle the covenantee to sue upon it. . . . But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors: . . . this would be an *illegal* contract to misapply the funds of the company, and the illegality might be set up as a defence."

The phrase *ultra vires* is applied in the English cases both to acts which simply exceed the powers conferred by the deed of settlement upon the officers as the agents of the share-holders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases to which that of *Royal British Bank v. Turquand* belongs, have no bearing upon the question under consideration, and hence they will be no further noticed.

In all the cases belonging to the first class, the object of the action has been, to protect the private rights of the share-holders; upon the ground that the action of the directors sought to be restrained would if permitted be a breach of trust. It would no doubt be a bar to any relief upon this ground, if it appeared that the parties seeking such relief had themselves assented to what the directors were about to do. They clearly could not be entitled, for their own sake, to protection against acts which they had themselves authorized. But the courts, in cases of this kind, have uniformly, and no doubt properly, acted upon the presumption that the share-holders had not assented to a violation of the charter, and have interfered, if at all, for the purpose of protecting them from a breach of trust on the part of the directors.

Still it has been repeatedly said, even in cases of this class, that there was a question of public policy involved which would be sufficient of itself to induce the courts to interfere. The case of *Coleman v. The Eastern Counties Railway Company*, 10 Beavan, 1, decided in 1846, was one of this class. It was an equity suit brought by a share-holder in behalf of himself and the other share-holders, against the corporation and its directors, to prevent the latter from entering into a certain agreement with the Harwich Steam Packet Company. The bill prayed for a declaration that it would be a breach of trust on the part of the directors to make the proposed contract, and for an injunction. Relief was granted. Lord *Langdale*, before whom the case was heard, speaking of the extensive powers of railway companies, said: "We are to look upon their powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be attained *by the public*." Again, he says: "In the absence of legal decisions, I look upon the acquiescence of share-holders, in these circumstances, in these transactions, as affording no ground whatever for the presumption that they may be, in themselves, legal." Here, then, in one of the earliest cases on the subject, in the English courts, we have the very doctrine for which I contend, distinctly recognized and asserted: viz., that the object of every grant of corporate powers is to obtain a *public* benefit; and that the powers granted are the consideration which the *public* pays for the benefit received or expected; and we also have the inevitable consequence stated, that every excess of power by the corporation is *illegal* although acquiesced in by every share-holder.

Three years afterward the case of *Cohen v. Wilkinson*, 13 Jurist, 641, came before the same judge. The complainant was a shareholder in the Direct Portsmouth Railway Company, and the object of the suit was to restrain the directors from proceeding to construct a portion only of the road authorized by the charter, without any preparation or intention to construct the whole. The judge said: "If it were established that the companies of this sort had authority, without a view to the whole, or for the purpose of performing the whole, to complete such part only as they please, or are able, of that which has been called their *contract or bargain with the public*, I think the consequences would be very dangerous to the public and to the share-holders, and probably productive of very extensive deception and fraud." In a similar case which arose shortly afterwards, viz., *Solomons v. Laing*, 12 Beavan, 339, Lord *Langdale* said: "Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors, or governing body of the company, in any manner *not distinctly authorized* by the act of Parliament, is, in my opinion, an *illegal* application or dealing."

Thus we find Lord *Langdale*, on three different occasions, asserting, in controversies between the share-holders and the corporation, that all acts and dealings of the officers of such corporation which were unauthorized by their charters, were to be regarded, not simply as breaches of trust, but as illegal and therefore void. But Lord *Langdale* is not the only English judge who has held, in cases of this class, that the unauthorized contracts of corporations are illegal and void, as against public policy. In the case of *Beman v. Rufford*, 6 Eng. Law & Eq. 106, which was an action brought by a share-holder in a railway company, to restrain the directors from carrying into effect a certain agreement made by them, Lord *Cranworth*, Vice-Chancellor, after stating his reasons for thinking the contract unauthorized, said: "And if that be the correct view of the law, I am clearly of opinion, on all the authorities and all principle, that it is the province of this court to prevent such an *illegal* contract from being carried into effect; because, on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds, out of the way in which it was *provided by the legislature* that they should be applied."

Now I understand those who differ with me on this subject to concede the principle of this case : that is, they admit, that for the directors to enter into a contract which their charter does not authorize, would be a violation of their duty to the share-holders, and that the latter may apply to a court of equity and obtain an injunction restraining the directors from carrying the contract into effect. It would be difficult to deny this. For if we take the same view of the nature of a corporation which they take, and consider the directors merely as the agents of the share-holders, and the charter as nothing more than their power of attorney from the corporators, the latter, as the principals, would have a right to repudiate and prevent the execution of a contract, made in their behalf by their agents, without authority ; inasmuch as every person dealing with such agents must, as is well settled, be presumed to know the extent of the powers which the charter confers.

The position then occupied by some of my associates is this : They admit that the share-holders in a corporation have a right to restrain its directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made ; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators. The latter constitute the corporation. Hence, by the two propositions just stated, it is maintained, that the corporators have a legal right to enjoin their representatives against the performance of a contract, which they themselves are legally bound to perform ; in other words, they are liable for damages, because their representatives have not performed a contract, which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the share-holders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize, — a principle established by numerous authorities, — or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not pre-

sumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both.

It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This, however, is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires*; nor is it the ground upon which such defences have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall therefore proceed further to show from the authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust towards the shareholders.

I shall cite but one additional case belonging to the first of the above classes; viz., *Winch v. The Birkenhead, Lancashire and Cheshire Junction Railroad Company*, 13 Eng. Law & Eq. 506. That was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement, which amounted to a lease of the defendants' road to the London and Northwestern Company. The Vice-Chancellor, Sir *J. Parker*, in disposing of the case used the following language: "It seems to me that it is not a question of simple incapacity on the part of the London and Northwestern Railway Company to undertake the working of this line, but that it is *against the policy* of these acts of parliament: and I think therefore that the agreement for making over this property to them, is an agreement *savoring of illegality*, which any shareholder in the Birkenhead Company has a right to come to the court to restrain."

The cases thus far noticed were all cases between the shareholders and the directors of the corporation, in which of course the question as to the liability of the corporation to third persons could not arise; and they have been referred to chiefly for the uniform *dicta* they contain, asserting the illegality of all unauthorized corporate contracts. I shall now refer to a class of cases in which the question of the liability of the corporation upon such contracts was directly involved.

The first case of this class, to which I will call attention, is that

of East Anglian Railway Company *v.* Eastern Counties Railway Company, 7 Eng. Law & Eq. 505. That was a suit upon a contract made by the directors, and the defence was, that the contract was not warranted by the charter ; and the court so held. *Jervis*, C. J., speaking of the class of cases to which I have previously referred, says : “ The cases in equity which have been cited, proceeded upon this view of the subject, and were decided, not because the particular act restrained by injunction was a *breach of trust*, but because it was not within the scope of the directors’ authority, was not justified by the statute, and was therefore *illegal*.” Again he says : “ If the contract is illegal, as being contrary to the act of parliament, it is unnecessary to consider the effect of dissenting share-holders.” This is a most explicit and emphatic judicial affirmation of the precise doctrine for which I contend, by the Court of Common Pleas in England, in a case in which there was no dissent.

The same doctrine has been held in several later English cases. Upon an application in *The Great Northern Railway Company v. Eastern Counties Railway Company*, 12 Eng. Law & Eq. 224, for an injunction to restrain the defendants from interfering, contrary to an agreement between the parties, to obstruct the plaintiffs in their use of a part of the defendants’ road, which was opposed on the ground that the agreement was *ultra vires*, the Vice-Chancellor said : “ If, therefore, this cause had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the court to interfere to some extent by injunction ; but I think *there lies at the root of this case a question of public policy*, which precludes the interference of the court.” These two cases were directly upon the point ; and they show the opinion of the Court of Common Pleas and the Court of Chancery.

The next case to which I shall refer, viz., *McGregor v. The Official Manager of the Deal and Dover Railway Company*, 16 Eng. Law & Eq. 180, was in the Court of Exchequer Chamber. It was an action at law to recover damages for the breach of a contract ; and the defence was, that the contract was *ultra vires*. The judgment of the court was delivered by Baron *Alderson*, who said : “ The Solicitor-General argued that this promise of the defendant was in truth a promise that the Southeastern Company should do an *illegal* thing, and that the promise was therefore void ; and we

are of that opinion. This is not like the promise of a party that an act *impossible* to be done shall be done by the defendant, or by some third person; but it is a promise that an act shall be done contrary to the *public law* of the country, of which both parties are bound to take notice. The act is therefore *illegal*, and the promise that it should be done is a void promise." The contract concerning which this was said was illegal in no other sense than that it was *ultra vires*.

In the subsequent case of *South Yorkshire Railway v. Great Northern Railway Company*, in the Court of Exchequer, 9 Exch. 55, where the questions were, 1. Whether the contract upon which the suit was brought was authorized; and, 2. If not, whether that constituted a defence — the court gave judgment for the plaintiff, on the ground that the defendants, in entering into the contract, had not exceeded their corporate powers. But no doubt seems to have been entertained, that the contract, if *ultra vires*, would have been void. Barons *Martin* and *Parke* expressly so held; and no opinion to the contrary was intimated by the other judges. It is true that Baron *Parke*, at the close of his opinion, says: "I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' company of the solemn contract into which they have fairly entered, and from which they are trying to escape." He had, however, previously laid down the rule as follows: "But where a corporation is created by an act of Parliament, for particular purposes, with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear, by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*."

Sir *William Erle*, one of the justices of the Queen's Bench, appears to be the only one of all the English judges who ever entertained any serious doubt upon this question. In *The Mayor, &c., of Norwich v. The Norfolk Railway Company*, 30 Eng. Law & Eq. 120, where the question arose, he combated the doctrine; contending that, in all those equity cases in which corporations had been restrained, at the instance of the share-holders, from entering into certain engagements, the court had proceeded solely upon the ground that the contracts, if made, would have amounted to a breach of trust; and insisted that the contracts of corporations

were only void at law when expressly prohibited. But, in the same case, Lord *Campbell* and Mr. Justice *Coleridge* expressed their entire concurrence in the previous decisions.

The question was finally carried to the House of Lords, in the case of *Eastern Counties Railway Company v. Hawks*, 35 Eng. Law & Eq. 8; and although the contract in that case was held to be within the powers of the corporation, and therefore binding, it was, nevertheless, expressly and fully conceded that, if it had been *ultra vires*, it would have been illegal and void. Lord Chancellor *Cranworth*, after citing the cases of *The East Anglian Railway Company v. The Eastern Counties Railway Company*, and *McGregor v. The Official Manager of the Deal and Dover Railway Company (supra)*, said; "I have referred to those cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think the present case comes within the principle on which these decisions have rested." Lord *Campbell*, in the same case, also fully assents to the doctrine; and yet this case is cited and relied upon to support the views of those of my associates who differ with me upon this question. But it will be found, upon examination, that even Lord *St. Leonards*, upon whose remarks they particularly rely, himself concedes the rule. He said: "The opinions of some of the judges in the *Norwich case (Mayor of Norwich v. The Norfolk Railway Company, supra)*, favor the disposition which I feel to restrain the doctrine of *ultra vires* to *clear cases* of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into." To this I agree. So far from denying the principle for which I contend, it concedes it. He afterwards says, speaking of two cases decided by the House of Lords at the same session: "They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot *clearly* be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their *deed of management*." In this

extract the judge again recognizes the doctrine, but insists that it should be made clearly to appear that the contract is *ultra vires* before it is applied. His last remark evidently refers to the class of cases already noticed, in which the defence is, not that the directors, in making the contract, exceeded the statutory powers of the entire corporation, but only the powers conferred by the deed of settlement. Those cases, as we have seen, have no bearing upon the question under discussion.

This review of the cases in England leaves no doubt as to the law upon this subject there. The question has been before every judge and every court, has been presented in every possible form, and argued by men of the highest talent, and the result has been uniformly the same. If it is possible to settle this question by authority, this must settle it at least in that country.

I shall content myself with a brief reference to the American cases, beginning with those in this state. The question was directly presented to, and decided by, the Supreme Court in the case of *Safford v. Wyckoff*, 1 Hill, 11. The action was against the defendant, as president of a bank organized under the general law of 1838, upon a bill of exchange or draft drawn by the bank, upon the North American Trust and Banking Company, in favor of one Dodge and indorsed to the plaintiff. It was held in this case, 1st, that the bank had no authority to issue drafts on time; and, 2d, that this constituted a good defence to the action. This case was prior to the entire series of English cases to which I have referred, and yet our court, without any of the light thrown upon this subject by those cases, placed its decision upon grounds which the courts at Westminster, after the most elaborate discussion and examination, have fully confirmed. The opinion of the court was delivered by Mr. Justice Cowen, who says: "True, there is no nullifying clause in the statute against negotiable notes and bills, in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied, not only in the general frame and scope of the statute, but more emphatically in its policy." In this sentence the judge met the argument that a contract which is merely unauthorized but not prohibited is not illegal. Another argument is answered by the following remark: "We admit the defence is an ungracious one, both as to Dodge and the drawers; it is not, however, *for their sake*, but for that of the statute *and the public* that we feel constrained to give

full scope to their defence. There would be more difficulty in sustaining it, as to the indorser, were it not to be regarded as an obvious attempt by all parties to violate a principle of public policy."

Here, then, *in limine*, we have the doctrine placed, in this state, upon grounds which subsequent repeated examinations have shown to be just. It is true that this case was reversed by the late Court of Errors (4 Hill, 442). But as this reversal proceeded upon the ground that the bank had power to issue the draft, it in no manner impairs the authority of the decision of the Supreme Court upon the point we are considering. Indeed, the Court of Errors itself confirmed the doctrine in the subsequent case of *McCullough v. Moss*, 5 Denio, 567. Of the other cases in this state I will only notice those in this court, the most marked of which is the case of *Leavitt v. Palmer*, 3 Comst. 19. This was an important case, and was elaborately argued. The suit was brought by a receiver of the company, and its object was to cause to be set aside and cancelled, forty-eight promissory notes of £1,000 each, issued by the North American Trust and Banking Company, upon the ground that they had been issued contrary to the provisions of the act of May 14, 1840. The question, therefore, was directly involved, whether a corporation can avoid its own contract by showing that it was made in contravention of the provisions of a public statute; and the report of the case shows that this question was distinctly presented and argued by the counsel. It was held unanimously by the court, that the notes having been issued in violation of the act, were illegal and void, and could not be enforced against the company.

There is this distinction between that case and the present: There the contract which the company had entered into was expressly prohibited; here it is prohibited by implication merely. But the case to which I have referred shows that this does not change the rule. The decisions in those cases all rest upon the ground that the contracts, being within the implied prohibition of the statute, were void as made in contravention of the policy of the law.

No such distinction, however, exists between the case under consideration, and that of *Talmage v. Pell*, 3 Seld. 328. That case involved the validity of three several contracts of the North American Trust and Banking Company, a corporation organized under

the general banking law of this state: viz., 1, a contract to purchase a large amount of state stocks of the State of Ohio; 2, certain certificates of deposit or promissory notes, issued by the company in payment for the stocks; and 3, an assignment of a certain bond and mortgage as security for the notes. Neither of these contracts were expressly prohibited by any law. The only objection to them was that they were not authorized by the act under which the company was incorporated; and this court held the contracts to be illegal and void upon that ground.

These cases show, that in this state, the late Supreme Court and Court of Errors, and this court, have all concurred in holding, in accordance with the numerous English cases to which I have referred, that the contracts of corporations which are *ultra vires*, are void and cannot be enforced. Similar decisions have been made by the courts of other states and of the United States: The Pennsylvania & Delaware Canal Company *v.* Dandridge, 8 Gill & John. 248; Hood *v.* The New York & New Haven Railroad Company, 22 Conn. 502; Elmore *v.* The Naugatuck Railroad Company, 23 id. 457; Mutual Savings, &c. *v.* The Meriden Agency Company, 24 id. 159; The Naugatuck Railroad Company *v.* The Waterbury Button Company, id. 468; Bank of Michigan *v.* Niles, 1 Doug. Mich. 401; Orr *v.* Lacey, 2 id. 254; Root *v.* Goddard, 3 McLean, 102; Root *v.* Wallace, 4 id. 8; Dodge *v.* Woolsey, 18 How. U. S. 331; Pearce *v.* Madison & Quincy Railroad Company, and Peru & Quincy Railroad Company, 21 id. 441. I shall not consume time and space by referring to these cases particularly. If principles can ever be settled by authority, if the slightest respect is due to the opinions of other tribunals, it would seem that no court could resist the overwhelming weight of the decisions which have been cited.

The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered, that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said, that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are

prescribed by statute, and every one who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as where the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not to the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

But the injustice which can ever accrue to individuals from permitting the defence in question, is trifling, under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, i. e., which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the state, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is, that the contract of the defendants to transport the plaintiffs from Chicago to Toledo was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted

while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend

upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars, was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. The Western Railroad Corporation*, 15 N. Y. 444, that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation ; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same ? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents ? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the

negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence ; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants ? To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the defendant to leave the cars ; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars became a participator in their unlawful conduct, and hence is not entitled to recover ; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from travelling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party, *a fortiori* may he claim redress for injuries consequent upon their *tortious* acts. He is so far regarded as *particeps criminis*, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain ; but he cannot be said, like an outlawed felon, to have *caput lupinum*,

and thus to be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. 4 Bl. Com. 320. Upon these grounds I think the recovery was right, and that the judgment should be affirmed. *Judgment affirmed.*

THE WRIT OF MANDAMUS. — GENERAL RULES OF LAW GOVERNING THE SAME. — CERTIORARI.

Strong, Petitioner, 20 Pickering's Reports, 494.

Where the petitioner was duly elected county commissioner, and the board of examiners refused to give him a certificate, and ordered another election, at which another person was chosen, it was *held* that mandamus would lie to the board of examiners to compel them to give him a certificate, notwithstanding he might be compelled to proceed by *quo warranto* subsequently to remove the incumbent of the office, chosen at the second election.

General nature of writ of mandamus.

THIS was a petition by Elisha Strong, setting forth, among other things, that he was duly chosen one of the three county commissioners for the next three years; that the board of examiners refused to give the petitioner written notice of his election, but issued their warrant for a new election; the petitioner prayed that he might be declared duly elected one of the county commissioners, and that a writ of mandamus might be issued to the board of examiners commanding them to find him duly elected as such commissioner, and also to give him a written notice of his election in due form of law. The return and answer of the respondents to this petition, among other things, set forth that at the election held, pursuant to their warrant, the board of county commissioners was filled, and the persons elected had been duly sworn to the faithful discharge of their official duties. After discussing the question whether the petitioner was duly elected, the court say, —

OPINION.

MORTON, J. But it has been contended for the respondents, that the petitioner has mistaken his remedy, and that mandamus will not lie. It was said that his appropriate remedy, if he has any, is by *quo warranto* and not by mandamus, or, at any rate, that a *quo warranto* should precede a mandamus.

In every well-constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them. In the former case by writ of error, in the latter by mandamus. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion, upon a particular subject. *Springfield v. County Commissioners, &c.*, 10 Pick. 244.

Mandamus is the proper process for restoring a person to an office from which he has been unjustly removed. *White's Case*, 2 Ld. Raym. 959, 1004; *Regina v. Baines*, 2 Ld. Raym. 1265; *Rex v. Chancellor, &c. of Cambridge*, id. 1334; *Rex v. London*, 2 T. R. 177; *Rex v. Field*, 4 T. R. 125. So also it lies to admit any one to an office, a service or a franchise from which he is unlawfully excluded. 6 Dane's Abr. 326; *Rex v. Surgeon's Company*, 2 Burr. 892; *Rex v. Barker*, 3 Burr. 1265; s. c. 1 W. Bl. 300; *Rex v. Bedford Level Corp.* 6 East. 356; *Rex v. York*, 4 T. R. 699, and 5 T. R. 66.

But it is strongly argued by the respondents' counsel, that inasmuch as the office, claimed by the petitioner is now filled by another, who can be removed only by a *quo warranto*, a mandamus will not lie. And, certainly, many of the authorities cited by them, support the position, that a mandamus will not lie to place one in an office actually filled by another, until the incumbent has been removed by a *quo warranto*. The case from 3 Johns. Cas. 79, *The People v. New York*, is directly in point. The court there say, that "where the office is already filled by a person who has been admitted and sworn and is in by color of right, a mandamus is never issued to admit another person."—"The proper remedy, in the first instance, is by an information in the nature of a *quo warranto*, by which the rights of the parties may be tried."

But notwithstanding the respectability and weight of this and the other authorities cited, there certainly are very many the other way; of which the case of *Dew v. The Judges of the Sweet Springs District Court*, 3 Hen. & Munf. 1, is one. Dew applied for a mandamus to the judges, to admit him to the office of clerk. It was

objected among other things, that the office was already filled and the only remedy was by a *quo warranto* against the incumbent. But all the judges of the Supreme Court of Appeals of Virginia "agreed clearly, that mandamus was the best remedy." See also 6 Dane, 335, and the cases there cited. Mr. Dane, with whom we concur, says, "On the whole the authorities, English and American, are much in favor of the mandamus, especially the more modern cases."

But the cases relied upon by the respondents, if in nowise shaken or overruled, are clearly distinguishable from the one before us, and may stand as sound law, and yet form no obstacle to the petitioner's application. The cases referred to were applications to be *admitted* to an office. The petitioner only seeks for a *certificate* of his election. This, if he obtains it, will not necessarily oust the incumbent or give the petitioner possession of the office. For these purposes he may still have to resort to a *quo warranto*, and possibly before he can get qualified to another mandamus. Two processes may be necessary to enable the petitioner to get possession of the office, the one to establish the legality of his own election, the other to set aside that of the incumbent. They are independent of each other. Both might have been applied for at the same time and proceeded *pari passu*. Had the petitioner first caused the incumbent to be removed, by a *quo warranto*, still, without the evidence of his own election, he could not enter into the office. So if a mandamus be now issued and complied with, he may still be obliged to resort to other legal proceedings before he can get regularly inducted.

The King *v.* The Mayor, &c. of York, 4 T. R. 699, and 5 T. R. 66, is analogous to the case at bar. An election of a recorder of the city of York was holden, and a certificate was given to Sinclair that he was duly elected. The certificate was to be presented to the king, for the purpose of obtaining his approbation of the election. Withers, the other candidate, applied for a mandamus to the corporation to give him a certificate, he having, as he alleged, a majority of the *legal* votes, and his opponent having gained the election only by the votes of persons not qualified to vote. An alternative mandamus issued, and afterwards, the return to that being insufficient, a peremptory one was ordered. Many other cases to the same effect might be cited, but without a further reference to authorities we are clearly of opinion that a mandamus is the proper remedy in this case.

We are aware that this is not a writ of right, but grantable at the discretion of the court; *Rex v. Commissioners of Excise*, 2 T. R. 385; that inasmuch as it is final and cannot be revised, on error or otherwise, the court will proceed with great caution in the exercise of so high a jurisdiction; Selwyn's N. P. (6th edit.) 1062; 1 Chit. Gen. Pract. 791; and that they will not grant it where there is any other adequate specific remedy. 1 Chit. Gen. Pract. 790; *Rex v. Bp. of Chester*, 1 T. R. 396; *Rex v. Abp. of Canterbury*, 8 East, 219. But we have no doubt that the present is a proper case for the exercise of our discretion; and that to refuse to grant the writ would be doing palpable injustice to the petitioner, and defeating the will of a majority of the voters of the county, clearly manifested by their votes, duly and legally evidenced before the proper tribunal. No other remedy can reach the evil. Although a *quo warranto* might remove the illegal occupant, it could not put the legal officer in his place. No civil action could be maintained by the petitioner, because there is no reason to doubt that the examiners acted *bona fide* and with a sincere desire to perform their duty correctly and legally. And if it could, it would be a very imperfect and partial remedy.

It cannot be maintained that the decision of the examiners was an act within their legal discretion. Whether their determination as to the reception or rejection of returns, would be deemed a *judicial* decision, may well be doubted. But nothing can be clearer than that the counting the votes, and ascertaining the majorities and giving certificates of the result, are mere ministerial acts. They have no *discretion* in determining which of the candidates shall be elected. It must be the result of pure, inflexible mathematical calculation.

We are therefore all of opinion, that the petitioner in first seeking to have the validity of his own election inquired into, pursued a wise and legal course, that the proper remedy is by mandamus, and that justice clearly requires that such a writ be issued. But the usual, if not invariable practice is, in the first instance to grant it in the alternative form, giving the examiners a further opportunity either to give the certificate or to return the reasons for refusing it. As the case has been fully heard, they will doubtless adopt the first branch of the alternative, unless facts or reasons occur to them which have not been presented to the court.

Alternative mandamus ordered.

In *Woodstock v. Gallup*, 28 Vt. 587, the proper office and practice upon writs of *certiorari* and *mandamus*, in the nature of a *procedendo*, was carefully considered, and the court, *Redfield*, C. J., say: "This was an original proceeding in this court by way of petition served upon the opposite party, by process in the usual mode, setting forth, in substance, that a petition was pending in the county court, for the purpose of laying out a highway, in the town of Woodstock, through the defendant's land, and that the report of the commissioners, establishing such highway, having been filed in that court, it was by such court decided, as matter of law, that they had no power to accept the report and establish the highway, on account of defects apparent on the face of the report, and that they rendered judgment thereon against the establishment of the highway, and dismissed the petition on that sole ground, and as a pure question of law. The petition alleged that there was no such legal defect in the report, and that the petitioners are entitled to have the highway established, and praying this court to grant a writ of *certiorari*, requiring the county court to send the record of that case into this court, and to reverse their judgment, and require the county court to proceed and try the case upon its merits. The defendant objects to the form of the process prayed for; and also that the judgment of the county court was the proper legal judgment in the case.

"In regard to the form of the remedy, and especially the particular remedy prayed for in the petition, it is, perhaps, not very important by what particular name we call it. The general prayer for such remedy as the court shall deem meet and proper is all that is required, and after naming one remedy, as in the present petition, *certiorari*, the addition of the general prayer for such relief as the party may be entitled to, is all that is requisite. And that amendment being matter of form merely, may now be made, and the court will award the proper writ.

"But since the subject is now properly before the court, as to the proper office of these different writs, it is not improper to examine it somewhat at length, as the subject has not often been much considered by the court. The statute, Chap. 28, § 5, gives this court power to issue writs of 'error, *certiorari*, *mandamus* prohibition, and *quo warranto*, and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice,' &c.

"The authority thus conferred has been regarded as co-extensive with the authority, in this respect, exercised by the Court of King's Bench, in England, so far as applicable to our condition and wants. And it has generally been the purpose of this court to adopt, substantially, the forms used in the King's Bench. But the organization and course of proceeding, in the superior courts, in reference to actions pending in the inferior courts, is essentially different in England from what it is in this state. As this court is now constituted, we have no general original jurisdiction, either civil or criminal, and no jury trials. And it has never been the practice to bring cases from the inferior courts into this court for trial, which is the principal use of the writ of *certiorari*, in England, where it is more generally confined to criminal proceedings; 4 Black. Com. 320-321; 5 Petersdorff's Ab. 114 [149]; 1 Bac. Ab. Tit. *Certiorari*; F. N. B. 245. But the cases reported under the title *Certiorari* in 5 Pet. Ab. 149, *et seq.*, shows that the *certiorari* is the substitute for a writ of error, in cases where the pro-

ceedings are not according to the course of the common law, and where, by consequence, no writ of error lies; and it extends to such proceedings as laying highways, and other judicial proceedings and matters, in the sessions, and other inferior tribunals. But in our practice, we never, upon writs of error, remand a case which is brought into this court and judgment reversed, where further proceedings are required, unless an issue of fact, proper to be tried by the jury, arises, but the case in all other respects is finished in this court. In analogy to this, we have never, that I am aware of, brought up a sessions matter into this court until it was finished in the inferior court, by a decision upon its merits; *Rand v. Townshend*, *supra*; *Paine v. Leicester*, 22 Vt. 44.

“It seems to us that the more appropriate remedy in cases like the present, where the inferior court disposes of the matters upon some incidental question, and decline to hear the case upon its merits, is a writ of mandamus, in the nature of a *procedendo*, as was held by the supreme court of the United States, in *Livingston v. Dorgenois*, 7 Cranch, 577, 2 Curtis, 677; and as was virtually done in *Ex parte Crane*, 5 Pet. 190, where a mandamus was issued to the judge of the circuit court, in the district of New York, requiring him to sign a bill of exceptions. The writ of mandamus is the supplementary remedy, so to speak, where the party has a clear right, and no other appropriate redress, to prevent a failure of justice; 3 Black. Com. 110; 12 Pet. Ab. 438 (309). It is the absence of a specific legal remedy, which gives the court jurisdiction; 2 Sel. N. P., Title, Mandamus. But the party must have a specific legal right; *Rex v. Barker*, 3 Burrow, 1265; *Ellenborough*, C. J., 8 East, 219. The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons, in some cases; but more generally the English Court of King’s Bench declines to interfere, by mandamus, to require a specific performance of a contract where no public right is concerned; Lord *Mansfield*, in *King v. Barker*, 3 Burrow, 1265–1270; Angell & Ames on Corp. 761; *The King v. The Mayor of Colchester*, 2 Term, 260; *The King v. Corporation of Bedford Level*, 6 East, 356. There is almost no end to the cases upon this subject. They will be found digested, under the title Mandamus, in *Petersdorff’s Ab.* and *Bacon’s Ab.*

“The *procedendo* seems to be only a particular form of the mandamus, and often to accompany the *certiorari*, and indeed always, perhaps, where the case is remanded for further proceedings in the inferior court. So that in the present case, if the *certiorari* had issued, and the record been actually brought into this court, all we could have done, would be, to reverse the judgment of the county court, and either hear it in this court, upon the merits, or remit it to the county court, with a writ of mandamus, in the nature of a *procedendo*, to hear the case and determine it upon its merits; 14 Petersd. Ab. 43 (32); 3 Black. Com. 109.

“The *procedendo* is always awarded where the case is more proper to be tried in the inferior court; *Pope v. Vaux & Wife*, 2 Black. 1060. But the mandamus and *procedendo* is not to require the inferior court to render any particular judgment, but to proceed and give judgment, notwithstanding some alleged excuse. *Ex parte Hoyt*, 13 Pet. 279. Nor will a mandamus be awarded where the party has an appeal to the same court where the mandamus is asked. *Ex parte Whitney*, 13 Pet. 404. And in this case, we prefer this mode of redress to that of *certiorari*, only because we can, in this mode, accomplish all that is

desired, without bringing the case here before it is finished in the inferior court.

“The case of *Walker v. The London & Blackwall Railway*, 3 Q. B. 744, is a case almost precisely in point. The sheriff was required to hold inquisition upon petitions for land damages against railways. Upon the trial of the plaintiff's case, the sheriff directed the jury to find a verdict for the defendants, on the ground that the plaintiff was not entitled to compel the company to purchase his property. The Queen's Bench, on application for a peremptory mandamus, decided that the writ must issue, requiring the sheriff to proceed and assess the damages, disregarding his former judgment and the verdict of the jury. The form of the writ there issued, was a mandamus, in the nature of a *procedendo*, as in the present case. But very likely the same thing might only be done by mandamus, in regard to those tribunals to which the superior court had power to issue the writ of *certiorari*. For if that were taken away, by statute, it would be regarded as an evasion to accomplish the same thing, more directly, by mandamus; *Rex v. Justices of Yorkshire*, 1 Adol. & El. 563; see *In re Edmundson*, 24 Eng. L. & Eq. 169.

“The petitioners having amended the prayer of the petition, by adding thereto, ‘or mandamus or other appropriate remedy, in the discretion of the court,’ the order was made.

“That a writ of mandamus, *in the nature of a procedendo*, do issue to the county court, in the county of Windsor, requiring them to proceed and hear, try and determine the case there pending between the parties aforesaid, as described in the petition to this court, upon its merits, and render judgment thereon, wholly disregarding their former judgment given in the case and complained of in the petition here pending, and that no costs, in this court, be taxed in favor of either party.”

In Com'th *ex rel. Hamilton v. Select and Common Councils of Pittsburgh*, 34 Penn. St. 496, it is held that a clear legal right in the relator, a corresponding duty in the defendants, and a want of any other adequate and specific remedy, presents a fit case for a mandamus; that it is the proper and appropriate remedy to compel a municipal corporation to make provision for the payment of interest, due upon bonds issued by it in payment of a subscription to the stock of a railway company, by the assessment and collection of the necessary taxes, — that the writ need not set forth when the principal will become due, nor when or where the interest is to be paid. The averment of the petitioner's ownership is sufficient without setting forth the particulars of his title, and that the defendants have refused to make provision for the payment of the interest without averring a demand.

In the English Courts of Chancery, King's Bench, and Common Pleas, the remedy by writ of *certiorari* is far more extensive and more frequently used than in the courts of this country. Its more general use is to bring up a judicial proceeding from an inferior court, at some stage anterior to the judgment. It seems that writ will not lie in any case where the proceedings are according to the course of the common law, and when judgment has been already rendered; the proper remedy then being by writ of error. *Ling v. Penegoes*, 2 D R. 209; s. c. *Petersd. Abr.* 168, citing 1 Salk. 150, 6 Mod. 61; 2 Ld. Raym. 971, 13 East, 411, 412, n. a. These cases, upon examination, will be found to involve other points, and that mainly; but the principal case decides the very point

for which we have cited it. But in the English practice this writ is used to bring up indictments and proceedings of a summary character, in almost all their stages of advancement, and upon almost all grounds, as the reported cases show, which will be found thoroughly digested in 5 Petersdorff's Abr. and 1 Bacon's Abr. Tit. *Certiorari*. The remedy has not been used for any such purposes in some of the American states. Many of the objects which in England have been obtained by *certiorari*, are here obtained by writ of mandamus from the superior courts to the inferior tribunals, requiring them to proceed to give such a judgment as the law requires, or to do certain other acts.

The chief difference in the remedy by *certiorari* and mandamus is, that by the former the record is brought into the superior court, and that court then proceeds with the case; while by the latter the case is to be proceeded with according to the order of the superior court, but in the inferior court.

But in some of the American States the jurisdiction in all matters, both civil and criminal, being portioned out to separate courts, and each jurisdiction being exclusive, it would tend to bring every thing into utter confusion, to give the party an election to remove his case, at will, into the superior court. And when a writ of error will lie, as it always will after judgment, when the proceeding is in the ordinary course of the common law, the remedy by *certiorari* is needless.

But where the proceeding is in the nature of an order of sessions, or decree of commissioners, although done in a court of record, a writ of error will not lie, as has been often held in regard to orders of the inferior court laying out highways. The only remedy in such cases is by *certiorari* or mandamus. *Paine v. Leicester*, 22 Vt. 44, 47.

In *Mendon v. County Commissioners of Worcester*, 2 Allen, 463, it was held that where the rights of a party are injuriously affected by an erroneous ruling of county commissioners, the appropriate remedy was a writ of *certiorari* to be issued in the exercise of a sound discretion, to bring before the supreme court the record of their proceedings, accompanied by a statement of their ruling, when there is no mode provided by law to bring up such questions by appeal, exceptions, or otherwise. The court, *Bigelow*, C. J. say: "It is true that the remedy of *certiorari* in our practice has been chiefly confined to cases where some error or defect in proceedings in their nature judicial, which are not according to the common law, appears on the record. But we are of opinion that the remedy is not necessarily confined to that class of cases. Indeed if it were, parties would be wholly without any remedy in all cases when the law gives them no right of appeal, or of exception, or any other mode of presenting questions of law for revision by a higher tribunal, arising in proceedings which do not appear on the record. It is obvious that such questions may deeply affect the rights of persons, and that there ought to be some mode of correcting errors which may be made in passing upon them. It would be a serious defect in the administration of justice, if no means were provided by which parties aggrieved could bring up before this court any matter of law, except such formal errors and defects as might be shown on the face of proceedings. But no such defect exists in our jurisprudence. By Gen. Sts. c. 112, § 3, a general superintendence is given to this court, of all courts of inferior jurisdiction, to correct and prevent errors and abuses therein, when no other remedy is expressly provided, and for this purpose to issue writs of error, *certiorari*, *mandamus*, &c., necessary to the furtherance of justice.

This broad and general authority was doubtless conferred for the purpose of enabling this court to bring before them any proceedings of judicial tribunals, when there was no special mode prescribed for revising and correcting them. We do not mean to say that on a *certiorari* a party could claim as a matter of right to have a decision or ruling of an inferior tribunal reversed, as in case of an appeal or exceptions, merely for the reason that it was not strictly accurate, or did not exactly conform to the rules of law. The granting of a writ of *certiorari* is always addressed to the sound discretion of the court; and it will not be granted unless it appears that some error has been committed which affects the rights of parties injuriously, and where justice requires that it should be corrected.

“In this case, as the commissioners did not proceed according to the course of the common law, and there is no mode provided by law for correcting the alleged error by means of an appeal, exceptions, or otherwise, a writ of *certiorari* is the appropriate remedy to bring their proceedings before us. The ruling of which the petitioners complain was clearly erroneous, and injuriously affected their rights. The writ will therefore be issued, containing a precept to the commissioners to certify their record to this court, accompanied by a statement of the ruling made by them on the point set out in the petition. *Dow v. True*, 19 Maine, 46; *Niblo v. Post*, 25 Wend. 280; *Le Roy v. Mayor, &c.*, of New York, 20 Johns. 430.

DEGREE OF CARE REQUIRED IN REGARD TO THE APPARATUS BY WHICH PASSENGERS ARE CONVEYED.

Ingalls v. Bills et als., 9 Metcalf's Reports, 1.

Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.

A passenger in a coach received an injury solely by reason of the breaking of one of the iron axle-trees, in which there was a very small flaw, entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received.

If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat.

THIS was an action of assumpsit on an implied promise of the defendants, as coach proprietors and common carriers of passengers, to carry the plaintiff safely from Boston to Cambridge.

In the court below the plaintiff introduced evidence tending to

prove that he, with others, took outside seats, as passengers, on the top of the defendants' coach to be carried from Boston to Cambridge; that while on the way, and while the coach was proceeding at a moderate rate, without coming in contact with any obstruction, one of the axle-trees broke and the wheel came off, and the coach settled down without being overset; that the plaintiff and some other outside passengers being alarmed, jumped from the top of the coach upon the pavement; and that the plaintiff's arm was thereby badly injured.

The defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense, in order that the said coach should be of the best materials and workmanship; and at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound, and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and road-worthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axle-tree at the place where it was broken as aforesaid, about three-eighths of an inch in length, and wide enough to insert the point of a fine needle or pin, which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the said breaking; that the said defect was entirely surrounded by sound iron one-quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally.

Upon this evidence, the defendants moved the court to instruct the jury that it was the duty of the defendants to use all possible care in providing a good coach, in keeping the same in due repair, and in due examination into its condition; and if they took such care, and the accident happened, without any fault or negligence on their part, but by reason of a defect which they could not discover, then the verdict should be for them; and that the plaintiff was not entitled to a verdict, unless the jury were of opinion that there was some degree of actual fault or negligence on the part of the defendants.

The judge declined giving these instructions, but submitted the evidence to the jury, with instructions that the defendants were bound by law, and by an implied promise on their part, to provide

a coach not only apparently, but really, road-worthy ; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible and could not be discovered upon inspection and examination ; and that if the jury were satisfied, from the evidence that the axle-tree broke in consequence of the original flaw or defect in the interior thereof, and the plaintiff was injured thereby, he was entitled to a verdict, although that flaw was invisible, and could not be discovered by inspection and examination externally.

The defendants further insisted, that if the plaintiff jumped from the coach without necessity, and that necessity brought upon him by them, they were not liable ; and that although a passenger might have jumped off without imprudence, still, if the plaintiff might have remained in his seat without imprudence, his jumping off was to be considered as his own act, and was done at his own peril.

Upon this point the judge directed the jury to inquire whether the plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution ; and instructed them that if the plaintiff was placed in such a perilous situation, in consequence of the defendants' failure to fulfil their obligations aforesaid, that, as a prudent precaution, for the purpose of self-preservation he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby, although it might now appear that he might, without injury, have retained his seat.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

OPINION.

HUBBARD, J. The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business, which requires their transportation from place to place in vehicles furnished by others ; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage-coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which

the greatest care in the examination and inspection of the coach could not guard against or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner cannot detect, after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently but really road-worthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are intrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been and still are held responsible for the safe delivery of the goods, with but two exceptions: viz., the act of God and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts, embezzlement, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied, and for the obvious reason that a great distinction exists between persons and goods, — the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do who have intrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage-coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is road-worthy, — that is, is absolutely sufficient for the performance of the journey undertaken, and that if an accident happens, the proof of the greatest care, caution, and diligence in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of *Israel v. Clark*, 4 Esp.

259; *Croft v. Waterhouse*, 3 Bing. 319; *Bremner v. Williams*, 1 Car. & P. 414, and *Sharp v. Grey*, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued.

It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches for the loss of goods, as early as the time of Lord *Holt*, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White v. Boulton*, Peake's Cas. 81, which was tried before Lord *Kenyon* in 1791, and published in 1795. That was an action against the proprietors of the Chester mail coach, for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord *Kenyon*, in delivering his opinion, said, "When these (mail) coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston v. Heaven*, 2 Esp. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage coach, for negligence in the driving of their coach, in consequence of which it was overset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of *Israel v. Clark*, 4 Esp. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axle-tree having broken; and one count alleged

the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, "if they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started, viz., whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of ship-owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie v. Griggs*, 2 Campb. 79, in 1809. There the axle-tree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury said, "as the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable. There was a

difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner v. Williams*, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There Best, C. J., said he considered that "every coach proprietor warrants to the public that his stage coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so in *Crofts v. Waterhouse*, 3 Bing. 321, in 1825, Best, C. J. said, "the coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J., in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge (Best) in the case of *Harris v. Costar*, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff *safely*. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp v. Grey*, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured. There the axle was an iron bar enclosed

in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood-work ; and it was proved that it was not usual to examine the iron under the wood-work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood-work ; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. *Gaselee*, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." *Bosanquet*, J. said, "the chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started it was not road-worthy, and the defendant is liable for the consequence, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." And *Alderson*, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction ; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of *Bosanquet*, J. ; viz. that a coach must be road-worthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship-owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the

learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of *Sharp v. Grey* is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says, "this was entirely a question of fact. It is clear that there was a defect in the axle-tree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And *Tindal*, C. J. who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also *Bretherton v. Wood*, 3 Brod. & Bing. 54, and 6 Moore, 141. *Ansell v. Waterhouse*, 6 M. & S. 385, and 2 Chit. 1.

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 626, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of *Hollister v. Nowlen*, 19 Wend. 236, they say, that "stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves (*Boyce v. Anderson*, 2 Pet. 155), Chief Justice Marshall,

in giving the opinion of the court, says, "the law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of *Stokes v. Saltonstall*, 13 Pet. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his *Treatise on Bailments*, §§ 592-600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and — from the number of artisans employed in the construction of the materials of a single coach — whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency, and adaptation of his own manufactures to the uses designed — which, in a community like ours, could not be practically enforced — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to ship-owners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods intrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so re-

peatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable. *Jones v. Boyce*, 1 Stark. 493. *New trial granted.*

The cases upon this subject have been very fully cited and commented on, *ante*, vol. ii. pp. 200–209. The question of the liability of a railway company for accidents arising from a defect in its apparatus for conveying passengers which could not have been discovered by any practicable mode of examination, has frequently arisen of late in New York. *Alden v. New York Central Railway Com-*

pany, 26 N. Y. 102, is one of the latest, and as it is regarded by some as one of the most important, and has been somewhat differently interpreted, we insert in full the opinion of the court. It was an action for damages to the plaintiff, a passenger in the defendants' car, arising from the car running off the track, owing to the breaking of the axle. It was extremely cold, and there had been an unusual severity and continuance of cold weather before the accident, which it was proved crystallizes iron, and makes it brittle. There was a small old crack in the axle, so covered by the wheel that it would have been impossible to discover it without taking the wheel off, and to replace it would require a power equivalent to twenty-five or thirty tons. Some of the witnesses, who were experts, testified that they knew of no way of discovering such a crack without destroying the axle. The defendants moved for a nonsuit on the ground that no negligence on their part had been shown, which was denied, and exception taken. The defendants requested the court to charge the jury that the care and diligence required of it by law did not require the taking off of the wheel to examine the axle before starting the car, which was refused, and exception taken.

GOULD, J. In regard to what has been called the negligence of railway companies, in not providing safe axles for their cars, the only case in our own courts which professes to fix any rule, is that of *Hegeman v. The Western Railway Corporation*, 3 Kern. 9. The result of that case held, in substance, that the company was responsible, both for the manufacturer's possessing the requisite skill, and for his actual exercise of that skill, in each particular axle, — the judgment in that case being against the company for negligence, in not having discovered a flaw in the axle, which could not have been discovered by any known trial after the axle came into the company's possession, but which might have been discovered by a process of bending, before it left the hands of the manufacturer.

But in that case the charge to the jury, at the circuit, held that, "in making the careful examination required by law, before the train started, the company was *not* guilty of negligence, if it made all the examination which human skill and foresight could make *without taking the machinery to pieces*." And in this court, the prevailing opinion says the company "is bound to use all precautions, as far as human care and foresight will go, for the safety of the passengers."

In the case before us, so far as the defect in the axle (the hidden crack) is concerned, it is clearly, and without any contradiction, proved that it was absolutely out of the reach of discovery by any practicable examination of the axle, unless by taking off the wheel, with great difficulty and labor; that is, "taking the machinery to pieces." Tried by the *Hegeman* case, it would seem that this defendant could not be responsible for an injury caused, as the one sued for seems to have been, by that defect; as it is positively testified "that it would not be safe to run at all an axle cracked as this was" found to have been on examination after the accident.

There has, however, always been something unsatisfactory in the decision of the *Hegeman* case, arising from the difficulty in finding any thing to call negligence in the acts of the company as there proved; and we can probably place the result of that case on a surer and more satisfactory ground, as well as fix a test of much easier application, by referring to another case. In *Sharp v. Grey*,

9 Bing. 457; s. c. 2 M. & Scott, 621, the proprietor of a stage-coach was sued for injuring a passenger by the overturning of his coach from the breaking of an axle. The axle was of iron, secured and strengthened by parallel wooden strips screwed on and around it; and before starting it was carefully examined, and showed no flaw. After the accident, it was examined, and it then appeared that it had been cracked for some time, but the crack was in such a place that it was not possible for any strictness of examination to find it, without taking off the wooden strips, the frequent taking off of which would have injured the axle, and rendered it less safe than it would be if those pieces of wood were left undisturbed.

Yet in that case a verdict of £500 was rendered against the defendant, and the court in banc refused to set it aside; holding unanimously (not that the defendant was guilty of any negligence, but) that he must be held accountable, in every event, to furnish a road-worthy coach; and that, if the event proved it not to have been so, he must suffer the consequences. And though this may seem a hard rule, it is probably the best that can be laid down; since it is plain and of easy application, and, when once established, is distinct notice to all parties of their duties and liabilities. And, practically, it will be likely to work no more burdensome results to carriers of passengers than to leave them, with an uncertain criterion of responsibility, to the trouble and expense of strongly litigated contests before juries.

The judgment of the Supreme Court should be affirmed, notwithstanding there may, in strictness, have been an error in the refusal to charge (as requested) that the defendant was not bound to take off the wheel and examine the axle; since, by the rule now laid down, so charging would be entirely immaterial to the result.

All the judges concurring.

Judgment affirmed.

In *McPadden v. N. Y. Cent. Railw.*, 47 Barb. 247, the Supreme Court of New York seem to regard the rule as established in that state that a common carrier of persons is bound to provide road-worthy vehicles, irrespective of any question of negligence, and that the principle of this rule would require the carrier who furnishes his own road, and has secured to him the exclusive possession and control of it, to provide a vehicle-worthy road; that is, a road adapted to the safe passage of the vehicle used over it, — a road of continuous unbroken rails for each and every train to enter upon in its passage over the road, and, as the rail is a part of the machinery by which the vehicle is operated, it falls directly within this principle; and, as it appeared in this case that the cause of the accident, and of the injury to the plaintiff was a broken rail which threw the car off the track, and that a train from the opposite direction had passed over the spot only a short time previous, and that there had been no examination of the track between that time and the time of the accident, it was *held* that the plaintiff should have been allowed to go to the jury upon the question whether the iron rail was not broken before the train on which he was a passenger came upon it, — it being clearly a question for the jury to determine, whether the broken rail was in a sound condition at the time such train came upon it. The court, *Johnson, J.*, say: "The plaintiff was improperly nonsuited. His counsel asked permission to go to the jury upon the question whether the iron rail was not

broken before the train on which the plaintiff was a passenger came upon it. The cause of the accident and the injury to the plaintiff was a broken rail, which threw the car in which the plaintiff was riding from the track, while the train was running at a speed of from twenty to twenty-five miles per hour. It appears from the evidence that the express-train from the west had passed over the place where the rail was broken only a short time previous, and that there had been no examination of the track between that time and the time of the accident in question. It was, therefore, clearly a question for the jury to determine, whether the broken rail was in a sound condition at the time the train in which the plaintiff was riding came upon it. It is claimed by the defendants' counsel that all the evidence shows that the rail was then in a safe condition, and that it broke under the train on which the plaintiff was riding. The most that can fairly be claimed is, that the evidence tended to establish this. It does not prove it conclusively, and it should have been left to the jury to draw the inference. The rule is now established in this state, that a common carrier of persons is bound to provide road-worthy vehicles, irrespective of any question of negligence (*Alden v. The N. Y. Cent. Railw. Co.*, 26 N. Y. 102). This is a simple, plain, and eminently sensible rule, and it should be applied in all cases falling clearly within the principle. The same principle would require the carrier who furnishes his own road and has secured to him the exclusive possession and control of it, to provide a vehicle-worthy road; that is, a road adapted to the safe passage of the vehicles used over it, — a road of continuous unbroken rails for each and any train to enter upon in its passage over the road. Strictly speaking, the rails is no part of the vehicle, though in some sense it may be said to be so. But however this may be, the rail is clearly a part of the machinery by which the vehicle is operated, and falls directly within the principle. The learned judge erred, therefore, at the circuit, in refusing to allow the plaintiff to go to the jury on the question whether the rail was not broken before the train on which he was riding came upon it. There must, consequently, be a new trial, with costs to abide the event."

This subject was before the Court of Exchequer Chamber in England, in May, 1869, in the case of *Readhead v. The Midland Railway Company*, reported in 17 Weekly Reporter, 737. The unanimous judgment of the court, consisting of *Kelly*, C.B., *Bramwell*, and *Channel*, BB., *Keating* and *Montague Smith*, JJ., may be regarded as an authoritative exposition of the present state of the English law. It was held that the contract entered into by a carrier of passengers, and the obligation undertaken by him, are to take due care, including in that term the use of skill and foresight, to carry passengers safely; there is no warranty by way of insurance on the part of the carrier to convey the passenger safely, or that the carriage should be in all respects perfect, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

Therefore, where an accident was caused by the breaking of the tire of one of the wheels of a railway carriage in which the plaintiff was travelling, owing to a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking, and the plaintiff was injured, it was held that no action lay against the company. We insert in full the opinion of the court in which the authorities bearing upon the question are fully considered, delivered by *Montague Smith, J.*: —

“In this case the plaintiff, a passenger for hire on the defendants’ railway, suffered an injury in consequence of the carriage in which he was travelling getting off the line and upsetting; the accident was caused by the breaking of the tire of one of the wheels of the carriage owing to a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. Does an action lie against the company under these circumstances? This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that for the plaintiff on this state of facts to succeed in this action, he must establish either that there is a warranty by way of insurance on the part of the carrier to convey the passenger safely to his journey’s end, or, as his learned counsel mainly insisted, a warranty that the carriage in which he travels should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

“We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care, including in that term the use of skill and foresight, to carry the passenger safely. It, of course, follows that the absence of such care, in other words negligence, would alone be a breach of this contract; and as the facts of this case do not disclose such a breach, and, on the contrary, negative any want of skill, care, or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below, in favor of the defendants, ought to be affirmed.

“The law of England has from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers.

“The liability of the common carrier of goods attached upon the particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors and bailees of things, are of course applicable only to things capable of bailment.

“The law and the reasons for it in the cases of bailments to carriers are found in the great judgment of *Holt, C.J.*, in *Coggs v. Bernard*, 1 Sm. Lead. Cas. 189, 6th ed., and are thus stated: ‘As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts, either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all

events. And this is the case of the common carrier, hoyman, master of a ship, &c., which case of a master of a ship was first adjudged, 26 Car. II., in the case of *Mors v. Slue*, Sir T. Raym. 220, 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king; for, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.'

"The same law is found in numerous text-books (some of which are referred to in the judgments of my brothers *Mellor* and *Lush* in their judgments below), and has been acted on for centuries in the case of carriers of goods.

"The court is now asked to declare the same law to be applicable to contracts to carry passengers.

"The learned counsel for the plaintiffs felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for, and mainly relied on, the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect, ought to be imported into the contract with the passenger.

"But first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods. This obligation is to carry and redeliver the goods in safety whatever happens; in the words of Lord *Holt*, 'he is bound to answer for the goods at all events.' Again, 'the law charges this person thus intrusted to carry goods, against all events but acts of God and the enemies of the king.' And this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle; for if the goods are safely carried and redelivered, it would be immaterial whether the carriage was roadworthy or not; and if the goods are lost or damaged, the carrier is liable on his broad obligation to be answerable 'at all events,' and it is unnecessary to inquire how that loss or damage arose.

"But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected, and a particular part of it severed and attached to what on the hypothesis is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understand it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound; but this is not the reason, or any thing like the reason, given by Lord *Holt* for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the

roadworthiness of the carriage in which the passenger happened to travel. This safety is, no doubt, dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train, and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all.

“If, then, there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and if so it must follow as a consequence of the argument that there is a warranty that all these things shall be and remain absolutely sound, and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it, so far tries the value of it. But surely if the law really be as it was contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies, in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling-stock, others from defects in the permanent works; long inquiries have taken place as to the causes of these defects, and whether they were due to want of care and skill, which would have been altogether immaterial if warrantees of the kind now contended for formed part of the contract.

“An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that every thing he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man by implication of law, and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to two maxims of law, ‘*Lex non cogit ad impossibilia*,’ ‘*Nemo tenetur ad impossibilia*.’

“If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases. As, for instance, to the managers of theatres or other places of public resort, who provide seats or other accommodation for the public for reward. Why are they not to be equally held to insure, by implied warranty, the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state.

“Thus a staircase in the Polytechnic Institution fell, and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs, who had paid money for their entrance. The first was tried before *Wightman, J.*, the second before *Erle, C. J.* No one seems to have supposed there was any warranty of the soundness of the staircase, yet the persons using it were as helpless to detect or prevent the accident as the traveller. Both learned judges put the liability entirely on the question, whether there was the want of due care in maintaining the staircase; and *Erle, C. J.*, told the jury that the defendants would not be liable for latent defects. *Brazier v. The Polytechnic Institution*, 1 F. & F. 507; *Pike v. Same*, id. 712. So in stating the liability

of a canal company, who made the canal for profit, and allowed the public to use it on payment of tolls, *Tindal, C. J.*, in delivering the judgment of the Court of Exchequer Chamber, says, 'The common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions; but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property.' *Lancaster Canal Co. v. Parnaby*, 11 A. & E. 223, 242.

"The liability in that case was not put in any degree upon a warranty that the canal should be free from perilous defects, but upon the natural obligations to use due care that it should be so. The common law with regard to carriers of goods and innkeepers, stands, as I have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the legislature has found it necessary, in both cases, to modify its stringency.

"It will now be necessary to examine the leading authorities cited during the argument. The counsel for the plaintiff in the first place referred to some of the cases in which it had been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. *Bigge v. Parkinson*, 10 W. R. 349, 7 H. & N. 955, is a case of that class. But the agreement to sell and supply goods for a price which may be supposed to represent their value, is a contract of a different nature from a contract to carry, and has essentially different incidents attached to it. Indeed the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods, it may be a question on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in a case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect; that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into; without, in fact, becoming an insurer, unless he limits his liability expressly.

"In cases of express warranties, the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability by any exceptions they please; and in those implied by law, the law itself must take care to keep them within the boundaries of reason and justice, so as not to impose impracticable obligations.

"It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favor is *Sharp v. Grey*, 9 Bing. 457. But that case when examined, furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axle-tree of a stage-coach; the defect might have been discovered if a certain examination had taken place, and it

was made a question of fact at the trial whether it would have been prudent or not to make that examination. *Tindal*, C. J., who tried the cause, is reported to have directed the jury to consider 'whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely.' Now, if the learned chief justice had supposed there was an absolute warranty of roadworthiness, this direction could not have been given; as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury, having found on his direction for the plaintiff, a motion was made, in the absence of *Tindal*, C. J., for a new trial. Two of the learned judges in refusing the rule, *Gaselee* and *Bosanquet*, J.J., are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. *Park*, J. uses language which as reported is ambiguous. But the judgment of *Alderson*, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says, 'A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation.'

"We have referred somewhat fully to this case because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the Court of Appeal in New York, in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of *Tindal*, C. J., and *Alderson*, J., is against the plaintiff. The dictum of *Best*, C. J., in *Bremner v. Williams*, 1 C. & P. 414, was not necessary to the decision of the case. The ruling of Lord *Ellenborough* in *Israel v. Clark*, 4 Esp. 259, was also relied on; of these two last authorities, *Blackburn*, J., says in his judgment below, 'These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood.' We find also that *Best*, C. J., certainly makes observations in the opposite sense, in the case of *Crofts v. Waterhouse*, 3 Bing. 319, 321.

"These cases are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by *Cresswell*, J., in *Benett v. The Peninsular & Oriental Steam Packet Company*, 6 C. B. 782, of the case of *Sharp v. Grey*, was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the court, and cannot be relied on as authority.

"On the other hand, there is not only the plain distinction between the liabilities of the carriers of goods and of passengers, constantly referred to by text-writers and judges as well known and settled law, but numerous cases have been decided on grounds at variance with the supposition that there existed contemporaneously with them the liability by way of warranty.

"In *Ashton v. Heaven*, 2 Esp. 533, which was the case of injury to a passenger, *Eyre*, C. J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses (except those happening from the act of

God or the king's enemies), and the reasons for it, says: 'I am of opinion the cases of losses of goods by carriers and the present, are totally unlike;' again, 'there is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone.' In *Christie v. Griggs*, 2 Camp. 79, Sir *James Mansfield* says, 'there was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance.'

"In *Crofts v. Waterhouse*, 3 Bing. 319, the observations attributed to *Best*, C. J., clearly show that he did not think there was any warranty on the part of carriers of passengers, and *Park*, J., in the same case, says: 'A carrier of goods is liable at all events; a carrier of passengers is only liable for negligence.'

"But besides the observations of individual judges to show what has hitherto been understood to be the law, there is a long series of important cases, involving costly and protracted trials, in which by common consent the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

"In *Grote v. The Chester and Holyhead Railw. Co.*, 2 Ex. 251, where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. *Parke*, B., says, 'It seems to me the company would still be liable for the accident unless he (the engineer) also used due and reasonable care, and employed proper materials in the work.' There is no trace in the report, that it ever occurred to the court to suppose there was any warranty of the safety of the bridge.

"In a case tried before *Erle*, C. J., *Ford v. London and South-western Railw. Co.*, 2 F. & F. 730, the plaintiff was injured by the tender of the train being thrown off the line; and one of the causes was alleged to be the defective tire of one of the wheels of the tender; *Erle*, C. J., in his direction, told the jury: 'The action is grounded on negligence; negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their passengers.' There the defect was in the tire of a wheel of the tender of the train by which the plaintiff travelled, and no suggestion that a warranty of its soundness existed was made.

"But a case still more directly bearing upon the present point was tried before *Cockburn*, C. J., *Stokes v. The Eastern Counties Railw. Co.*, 2 F. & F. 691. There the accident happened in consequence of the breaking of the tire of the near wheel of the engine. The tire broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were, whether the flaw was not visible, and whether, by the exercise of care, it might not have been detected. The lord chief justice commences a full direction to the jury by saying, 'The question is whether the breaking of the tire resulted from any negligence in the defendants or their servants, for which they are responsible.' The latent defect in the tire was admitted to be the cause of the accident, but

the jury having found in answer to specific questions that there was no evidence that the tire was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants.

“The facts of that case appear to be exactly like the present, except that in this the defective tire was in the wheel of the carriage, and there in the engine; but for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain a trial of six days took place on issues which were utterly immaterial, if a warranty ought to have been implied; and there the learned chief justice and the parties themselves seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case was right; for the warranty as an obligation implied by law must have existed at the time of these trials if it exists now; and surely it is strong to show that no such rule does form part of the common law, that it was not then recognized and declared.

“The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses however caused, whether by the unseaworthiness of the ship or otherwise: and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon v. Mells*, 5 East, 428, it was no doubt stated by the court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that *Holroyd*, who argued for the plaintiff, and *Gaselee*, for the defendant, both state the liability of the carrier in all its breadth; viz., a liability for all losses, however happening, except by the act of God or the king's enemies. This case, therefore, falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that no passenger in this maritime nation has ever founded an action upon it.

“The case of *Burns v. Cork & Bandon Railw. Co.*, in the Irish Court of Common Pleas, 13 Ir. Com. Law Rep. 543, certainly does not support the plaintiff's view of the law. The court say there that the averments in the defendants' plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shows that the court do not mean to declare there is an absolute undertaking that the vehicle shall be free from defects. The language is, ‘free from defects as far as human care and foresight can provide, and perfectly roadworthy.’ The court refers with approbation to the language of *Sir William Mansfield* and *Alderson, J.*, which helps to explain that they were disposed to adopt the views of these learned judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

“It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice *Hubbard* in *Ingalls v. Bills*, 9 Metcalf, 1, 15, cited at length by my brother *Mellor* in his judgment below, is opposed to the notion of a warranty. Decisions, however, were cited before us by Mr. Manisty from the courts of the State of New York having a

contrary tendency, and to show us that in that state the law had been declared in favor of annexing a warranty to the contract. The most important of these cases is *Alden v. The New York Cent. Railw. Co.*, in the Court of Appeals of the State of New York, 12 Smith, 102. That was the case of an accident caused by a defect in an axle-tree. The reasons given by *Gould, J.*, are not satisfactory to our minds; the learned judge seems to assume there was no negligence shown on the part of the company; he cites the case of *Sharp v. Grey*, in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach.

“But if the view of the case of *Sharp v. Grey*, taken in the early part of this judgment is correct, the learned judge gave too great weight to it. *Gould, J.*, then, after having given the rule as he supposed it to be laid down in *Sharp v. Grey*, observes: ‘And though this may seem a hard rule, it is probably the best that can be laid down, since it is plain and easy of application, and, when once established, is distinct notice to all parties of their duties and liabilities.’ With deference to the learned judge, these reasons, founded on the convenience of the arrangement, are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties, and the terms in which the judgment is given rather lead to the conclusion that the learned judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine them, with the result which has been stated.

“Warranties implied by law are, for the most part, founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.

“We have already gone fully into the reasons for holding that in our opinion this alleged warranty is not so founded. On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which, because of its reasonableness and accordance with what men perceive to be fair and right, has been found applicable to an infinite variety of cases in the business of life; viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carrier of passengers; nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they are liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on the point, *Grote v. The Chester & Holyhead Railw. Co.*, 2 Ex. 251.

“‘Due care,’ however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance; to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice, to our minds, of being compelled by the law to make reparation for a disaster arising

from a latent defect in the machinery they are obliged to use, which no human skill or care could either have prevented or detected.

“In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason; consequently the judgment of the Court of the Queen’s Bench in favor of the defendants, will be affirmed. *Judgment affirmed.*”

ON THE CONSTITUTIONAL RIGHT OF THE STATES TO TAX SHARES OF DOMESTIC CORPORATIONS HELD BY NON-RESIDENTS.

- I. The requirements of the statute of 1854 involve great inequality and injustice, as matter of taxation. In principle it must involve, if legal, the right of destroying the stock of non-residents, at the will of the legislature. For if the principle is legal, it may be extended, till it absorb the entire income of the stock. Hence some have attempted to *imply*, in every grant of a charter of incorporation, an *exemption* from taxation. But this is no more to be *inferred*, from such a grant, than from the grant of any other property, real or personal.
 1. Corporations taxable for property, income, and faculty.
 2. The capital stock or property of corporations clearly taxable to them.
 3. Mr. Justice *Wayne’s* exposition of the subject.
 4. Three species of property taxable to the corporation: 1st. Capital stock; 2d. Property; 3d. Franchise.
 5. Shares taxable only to the owners.
- II. If, then, the corporation is taxable for its capital stock, why may it not be taxed for the portion represented by shares owned by non-residents?
 1. It is certain this could not be done, as to a portion of the capital represented by the shares of the resident owners.
 2. Taxation implies an equalization upon the same class of property throughout the district taxed.
 3. It is, therefore, not competent to tax property of the same class at different rates, in different portions of the district taxed.
- III. But it may be urged that this rule does not extend to non-residents.
 1. As to real estate, a different mode of appraisal, on account of the non-residence of the owner, will not render the tax void.
 2. But non-resident citizens and aliens do not stand upon equal footing, as to taxation.
- IV. The United States Constitution secures to non-resident citizens of any of the United States the right of equal taxation with the citizens resident within the state where the tax is levied.
 1. The article in the old Confederation, compared with that in the present Constitution, upon this subject.
 2. This article has always been regarded as having reference to acquiring and holding property in the several states by the citizens of other states.
 3. This view was early adopted when the subject was fresh in the minds of all, and while the framers of the Constitution were upon the bench and at the bar.
 4. Two decisions of the Maryland Court of Appeals stated, wherein it is held to have chief reference to taxation.

5. The opinion of Mr. Justice *Washington* stated, wherein he held similar views.
 6. Cases cited from the Court of Appeals in Virginia and Kentucky, holding similar views.
 7. A case from Alabama, expressly deciding the very point, within the last few years, stated.
 8. The course of the decision is uniform in that direction, and there is nothing to oppose it.
- V. This indemnity against unequal taxation, extends not only to the amount, but to the principle or the mode, of its levy.
1. The security, in regard to taxation, being reasonable in degree, depends much upon its affecting all alike; and this security is more important to non-residents than to residents.
 2. This applies with great force to the different corporate interests, both as to the corporation and the corporators.
 3. Shares are only taxable to the owner, in the place of his domicile.
 4. And it is not material where the corporation is located.
 5. The shares have no *situs* except the domicile of the owner.
 6. The title to the shares and to the capital stock entirely distinct.
 7. The only subject, in regard to which the shares and the capital stock are regarded as identical, is that of *exemption from taxation*.
 8. But this does not prove that both may not be taxed at once.
 9. Double taxation, illegal, but taxing shares and capital stock, is not.
 10. The corporation is taxable, at the place of its principal office, for its franchise and all its property, except real estate.
 11. The injustice, or abuse, of taxation, in detail, will not render it void, but its vicious principle will.
 12. The fact that the corporation is taxed for all its property and its franchise has no tendency to exempt its shares from taxation.
 13. The objection, in principle, to a tax of this kind is, that it is a special imposition upon a limited class of property, easily destroyed.
- VI. *Résumé* of points established.
1. That a non-resident cannot be taxed upon shares.
 2. The United States Constitution secures equality of taxation to non-residents, both in amount and in principle.
 3. This tax is, in reality, upon the shares of a non-resident, but, in form, against the corporation, upon an aliquot proportion of its stock, represented by the shares of non-residents.
 4. Illustrations of the entire inadmissibility of this mode of taxation.
 5. And it is no excuse, that, in consequence of the non-residence of the owners, no other mode is practicable.
 6. It is, in substance a levy of a tax, on account of choses in action, upon the debtor, because the creditor does not reside where any such levy can be made upon him.
- VII. Conclusion. The tax is void for many reasons.
1. It is far more than the shares of residents are taxed for state tax.
 2. Views of Angell and Ames upon the point.
 3. It is not a tenancy in common, and if it were, it would be illegal to tax the share of one tenant higher than those of the others.
 4. Such a right of taxation, subversive of liberty.
- VIII. There can be no question in regard to relief in the Circuit Court of the United States.

OPINION.

The following opinion in regard to the constitutional right of the states to tax shares in domestic corporations held by non-residents, showing the grounds upon which the statute of Vermont, imposing a special tax upon the railway stock of non-resident citizens, must be regarded as invalid, having been substantially adopted by the decision of the United States Circuit Court for the Vermont District, in an opinion delivered by Mr. Justice *Smalley* in which Mr. Justice *Nelson*, who was present during the argument, concurred, and that judgment subsequently affirmed in the Supreme Court of the United States,¹ is deemed of sufficient importance to be here presented to the profession.

¹ This judgment having been affirmed, although by a divided court, will of course constitute the law of the land until reversed by some alteration of the organic law. The difference of opinion among the judges is explainable, doubtless, to some extent, upon the ground of the very great changes which have taken place within the last few years, in regard to the dread of legislative abuses by way of arbitrary exactions in the form of taxation, as well as applying private property to the public use in other forms. There is such a blind enthusiasm, at the present day, in favor of unrestricted latitude in the exercise of legislative power, in almost every form, through the practically irresponsible agency of popular majorities, that it would be wonderful not to find it producing some influence in the most stable of our judicial tribunals. Perhaps it is not altogether desirable that it should not be so. A proper regard for the stable advance of popular sentiment upon the controlling social and commercial interests of the hour, is one of the indispensable requisites of all wise and successful judicial administration. But nothing of this character has any right to demand of the courts to declare that a fundamental provision of the national Constitution, originally inserted for the very purpose of protecting the citizens of one state from being subjected to a larger extent of taxation, or in any different mode of exaction, upon their property in another state than what was demanded of the resident citizens of that state, and which had been so received and construed by all courts, state and national, for two generations, shall now be regarded upon some new theory of exposition as having no reference whatever to the very thing for which it was mainly designed, both by the convention which prepared the Constitution and by those which adopted it in the several states.

We do not intend to intimate that those judges who dissent from this opinion entertain the view which we do in regard to the original purpose of this constitutional limitation and its proper application to the mode of taxation in controversy. We know well enough, of course, that any man of sufficient capacity or character to reach a place on that bench must of necessity act upon his legal convictions, any other course would indicate mental aberration almost. We can scarcely conceive of the possibility of any such thing. But we know there are men in the highest places of all the other departments of the government, of ability and character, who are nevertheless, from their course of life and habits of thought, quite incapable of comprehending how any one should regard an ancient and uniform construction of a statute

The following opinion has been prepared, at the request of the Vermont and Canada Railroad Company, with great care and study, and after the most attentive examination of the authorities, with the sincere desire of finding every thing bearing upon the question. The points decided, and in some instances the views of the court, have been stated more at length than would otherwise have been requisite, in order to enable the reader to form a reliable opinion in regard to the justness of the conclusions, without the necessity of recurrence to the books, many of which are not easy of access in all places. The author is ready to give full assurance that every case is fairly stated, and that he has brought out every thing which he found, where it appeared to him to have any legitimate bearing upon the question, whether in favor of or against his ultimate conclusion. In doing this, he has of necessity presented many views, not having any very decisive tendency to support his final result, and some having more or less bearing in an opposite direction. But he believes the result to which he comes is the only one consistent with established principles.

or constitution, as forming any part of the law created by it. They seem to comprehend well enough that there is something sacred in the letter of the law, but that any such quality also attaches to its traditional constructions appears to them a species of subserviency to the past, and a degree of present pusillanimity which they can scarcely comprehend, and certainly can never sufficiently despise. They may, perhaps, think very much of the views of Plato or Aristotle, and possibly of those of Cicero and Quintilian, when those opinions happen to possess the redeeming qualities of coinciding with their own necessities at the moment; but they care little for the obsolete dogmas of such bungling and inartistic commentators upon our own Constitution as would clog its heavenward aspirations, and drag it down to earth by loading its wings with the dead weights of contemporary exposition.

It may not be altogether out of place here to say to such philosophic expounders of the law that their own sense of gratitude for being delivered from the ordinary burdens of the flesh, and in being permitted to see so clearly what to others is at most a haze and mist of darkness, should not allow them to forget their brethren, still staggering under their load of the common infirmities that flesh is heir to, and surely they ought not to charge others with any want of good faith, or honest, earnest patriotism and loyalty to the truth or to the empire, when it is considered that all the eminent jurists of the two first generations of the republic entertained a most unquestioning acquiescence in the same limited and what are now regarded as narrow and commonplace opinions. If in this antiquated school we can be allowed to remain quietly until we have shuffled off our mortal coil, we will accept the boon with most devout thankfulness. But, by God's grace, we mean to die in the faith of the ancient fathers of the republic, and to stand by the old landmarks, not obstinately or foolishly strenuous in regard to matters of form and detail, but in the matter of substance and principle to cavil upon the ninth part of a hair.

The question discussed in this opinion and argument, arises upon the following provision in a statute of the legislature of the State of Vermont, requiring "the treasurers of the several railroad corporations in the state, on or before the first day of August, annually to pay, as a tax, into the treasury of the state, *for the use of the people thereof*, one per cent on each and every share, which shall be owned by any person or persons, *residing without this state*," whenever the annual dividends of the company amount to six per cent or more upon the capital stock.

The question becomes important, in determining the course proper to be pursued by the Vermont and Canada Railway, the only one in the state whose annual dividends amount to six per cent. For if the statute is valid, the treasurer, as a loyal and dutiful citizen, and subject of the government of the state, desires to perform his duty, according to its requirements. And on the other hand, if the enactment is such an infringement of the national Constitution, and such a disclaimer of that courtesy towards the citizens of other states of the Union, which the national Constitution secures, as to be wholly inoperative, and, in effect, constructive resistance against the principles of our national Union, although perpetrated in all the possible good faith which ignorance and misconstruction can afford, the treasurer desires to maintain his paramount allegiance to the principles of the national Constitution, and not become implicated in even that constructive disobedience to national allegiance, which his co-operation in carrying into effect such a statute would imply.

We have taken the liberty of italicizing one clause in the statute, which is so very unusual, as fairly to imply that the framers of the statute were not unconscious that the statute would be obnoxious to remonstrance, and might very naturally be regarded as not a little out of the ordinary course. For after having required this exaction to be paid, "as a tax into the treasury of the state," there could have remained no possible necessity of defining "its use," unless from a consciousness of the requirement being out of the common course. The framers of that statute could not have supposed that such a tax would be regarded as for any other use than that of the people of the state, after being paid into the treasury of the state, unless from its character they were apprehensive that some suspicious person might conjecture, or intimate, that the exaction was of such a description that it must be intended for

some less legitimate purpose than "the use of the people" of the state. From the fact that no such explanation of the purpose of taxation is to be found in the frame of any of the statutes of the state, which are annually passed, imposing taxes for the support of government, we think it fair to conclude that this commentary, setting forth the purpose of the levy, did spring from a consciousness that the exaction was of a nature to provoke remonstrance on the part of those subjected to it, and to invite criticism from other quarters, perhaps, and hence this volunteer offer of a vindication of the thing in advance.

I. We shall first attempt to show that the apprehension of the illegality of this imposition exclusively upon non-resident shareholders, if any such existed in the mind of the framers of the statute, was not without just foundation. We are not sure, indeed, that the framers of this statute comprehended fully the grounds of its illegality; but its one-sidedness, and extortionous character, stand out so prominently in its very terms, — "one per cent on each and every share which shall be owned by any person or persons, *residing without this state*," — as clearly to imply great want of *equality* and *justice*. Else why make such a marked discrimination between the shares owned by residents and non-residents? And it must have been obvious to the framers of this statute, that if this exaction could be vindicated upon principle, it could equally, if carried up to the point of absorbing the entire dividends upon non-resident stockholders' shares.¹ This, it must have been well understood, could only be vindicated upon the single ground of the non-residence of the owners, a discrimination between citizens and aliens only to be justified upon the ground of some imperious necessity of public policy; and having no parallel in modern times, and in civilized states; but carrying us back at once, over centuries of advancing civilization, to a period, when a non-resident alien was regarded as a barbarian and an outlaw. But we shall recur to this point again. We will now examine the general subject of taxation, as applied to corporations.

1. Corporations, like natural persons, are liable to taxation, both upon their property and income; and also upon their faculty. The faculty of a corporation is its organic life, its corporate existence, by which it is enabled to carry on business; that which it derives from its charter of incorporation, its corporate franchise.

¹ *M'Culloch v. Maryland*, 4 Wheaton, 316.

Hence it was at one time claimed, that the legislature having granted a corporate charter, without restriction or reservation, it could not impose such restriction, by way of taxation, since the power of taxation implied the power of destruction, as declared by Chief Justice Marshall,² and such a power would therefore be subversive of the grant, equivalent to a repeal, which is confessedly beyond the power of the legislature.³ But this course of reasoning was very early declared to be fallacious by the courts, since there is no more exemption of corporate property, or faculty, implied in this grant, than in the grant of any other property, real or personal, which has never been claimed by any one. It is inferring the non-existence of a power, from its possible abuse, which would go far to subvert all powers.⁴ It has also been held that the states have the power to tax their own stocks, which is a grant and bought with a price.⁵ And it has recently been held that the stocks of the United States, as a source of income, are taxable by the states even.⁶

2. There can be no question that the capital stock of corporations, or their property, both real and personal, is taxable to the corporation itself.⁷

3. The subject of the taxation of corporations is well discussed, and learnedly and carefully defined by Mr. Justice Wayne, in delivering the opinion of the court.⁸ "The franchise is their corporate property, which, like any other property, would be taxable, if a price had not been paid for it." . . . "The capital stock is another property corporately associated for the purpose of banking, but in its parts is the individual property of the stockholders, in the proportion they may own them; and being their individual property they may be taxed for it, as they may for any other property they may own. A franchise for banking is, in every state in the Union, recognized as property. The banking capital attached to the franchise is another property, owned in its parts by per-

² *M'Culloch v. Maryland*, *supra*.

³ *Dartmouth College v. Woodward*, 4 Wheaton, 518.

⁴ *Portland Bank v. Apthorp*, 12 Mass. 252; *Providence Bank v. Billings*, 4 Peters, 514.

⁵ *Champaign County Bank v. Smith*, 7 Ohio St. 42.

⁶ *The People v. The Commissioners of Taxes*, New York Court of Appeals, 10 Am. Law Reg. 81.

⁷ *Bank of Commonwealth v. Commissioners*, 32 Barb. 509; *Oswego Starch Factory v. Dollaway*, 21 New York Court of Appeals, 449.

⁸ *Gordon v. The Appeal Tax Court*, 3 How. (U. S.) 133.

sons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

4. We here find the clear recognition of three kinds of corporate property, taxable to the corporation, and the shares in the hands of the corporators distinctly defined, as a fourth species of corporate property, which is taxable only to the owners or holders.

1. The capital stock ; 2. The corporate property ; 3. The franchise of the corporation ; all of which is taxable to the corporation ; and the shares in the capital stock, which is taxable only to the share-holders.

II. It may here naturally be inquired, if the capital stock is taxable to the corporation, why may not the proportion owned by non-residents be taxed separately to the corporation ?

1. It is obvious this could not be done as to a portion only of the resident share-holders. The very idea of taxation, the very etymology of the term tax, or taxation, implies that it is an imposition, or levy, upon persons or property, in due course or order, treating all alike in the same district, and the same condition and circumstances. The burden of taxation must be equalized in this mode, in order to preserve its character. It is in any view, taking private property for public use, and it cannot be so taken, without an equivalent, both as to the government and the other citizens. It is not competent for the government to convert private property to public use, by way of taxation, and without compensation, any more than in any other mode.

2. It is true that government is supposed to render an equivalent for taxation, in the protection which it affords to personal rights, and to the rights of property. But this is not the only equivalent required in the idea of taxation. It is also indispensable that the imposition should be made ratably, that the burden may thus be equalized throughout the state or district upon which it is imposed. And if property is taken by mere arbitrary imposition, and without the *bona fide* purpose and attempt thus to equalize the burden, it is nothing less than the confiscation of the property. It becomes a decree or judgment, and being done, without any lawful jurisdiction, and without even the forms of judicial procedure, it is as absolutely void, as if the property of the citizen were taken for the support or transportation of the army or navy, and its munitions and *material* without equivalent,

in time of war ; or as if the right of way, for purposes of permanent intercommunication, in time of peace or war, were taken without compensation, which is expressly prohibited by the constitution of the state.

3. Hence, although the whole capital stock of corporations is unquestionably taxable to the corporation, it is not competent to tax it unequally, and in parts only, with reference to the residence of the owners who do live within the state. It would not, therefore, in a general state tax, be competent to require a corporation to pay a tax of one per cent upon that portion of its capital stock owned in one county, and half of one per cent upon that owned in another county, and two per cent upon that owned in a third county, and none at all upon that which was owned in still another. And it would make no difference in this respect that the portion of the capital stock not taxed to the corporation was taxed to the owners of the shares constituting that proportion. It is indispensable to the character of legal taxation that it should make no discrimination, either in regard to persons or property, in the same condition. This is a principle so familiar to all lawyers as scarcely to require the citation of authority. It is of the very essence of taxation, and one of its indispensable elements, that it should be equalized by this ratable mode of imposition. We apprehend there will be no question in the minds of men anywhere that this must be true, as to the taxation of the capital stock of corporations, so far as the resident owners are concerned. We presume the legislature supposed this unequal mode of taxing the corporation justified, if at all, on the ground of non-residence of some share-holders.

III. And it may be urged that residents and non-residents are not in the same condition, and that therefore some discrimination, in regard to the mode of taxing the proportion of capital stock represented by their shares, may be justifiable.

1. In regard to property which is taxed to all owners, whether residing within the state or not, — as for instance real estate, — the fact that the detail of proceedings in making the appraisal of the property, or the levy of taxation, is varied, so as to meet the convenience of making such collections of non-residents, and which is rendered necessary or convenient in consequence of the non-residence of the owners, or any thing of that merely formal character, and which is not intended to, and does not, in fact, make

any unjust discrimination in regard to the amount of taxation against non-residents, will not affect the legality of the tax.⁹

2. But it may have been supposed that non-residents and aliens stand upon the same footing, in regard to taxation of their property interests within the state. This is, we think, a not uncommon misapprehension ; but it is, nevertheless, a real misapprehension. In regard to aliens non-resident, there is no question the state may, if it deem such a course proper and creditable, provide that they shall not hold any property, either real or personal, within the state. It may, as already intimated, treat all non-resident aliens as barbarians and outlaws, if it so elect, as was formerly done, even in civilized states, and is still practised in some half-civilized countries. It is upon this ground that a tax payable upon all legacies due to non-resident aliens was held constitutional and valid.¹⁰ Mr. Chief Justice *Taney* there said: "Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee ; and it may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state." So also if the state may prohibit the alien from holding property within the state, whether in corporations or not, as it most unquestionably may, it must be allowed to affix such conditions to the tenure as it may deem prudent and reasonable, either by way of taxation or otherwise. As is said in the last case named : "If a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." Here "the right to take is given to the alien, subject to a deduction of ten per cent for the use of the state."

IV. But it is settled, by a long course of judicial decisions, that it is not competent for the legislature of one of the American states to make any such discrimination in regard to the citizens of the other states in the Union.

1. The 4th article, § 2, of the United States Constitution was expressly aimed against all such abuses. This section provides : "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." The confederation which preceded the Constitution contained a similar

⁹ *Redd v. St. Francis County*, 17 Ark. 416.

¹⁰ *Mager v. Grima*, 8 How. (U. S.) 490.

article, more in detail, concluding: "And the people in each state shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively." The article in the present Constitution is condensed, very much at the expense of its perspicuity. If it had been left as it originally stood, with ten words more, it would have been perfectly obvious it had principal reference to placing the citizens of the Union upon equal footing, in regard to taxation, throughout the whole country, and to prohibit those invidious discriminations, which, as we have seen, sometimes prevail in regard to non-residents and aliens. But as the present article supplies the place of the former one, and does not vary the provisions, except by making its terms more general and less specific, it would be impossible to suppose it could have been intended to cover any other subject, much less to exclude that which it had formerly embraced.

2. Hence this article in the present Constitution has always been held to give the citizens of all the states the same rights in every other state, as to holding and enjoying property, which the citizens of that state have.¹¹

3. Early in the history of the jurisprudence of the country, while the subject was fresh in the minds of the people, and the discussions consequent upon the adoption of the instrument were in the minds of all, and while many who had participated actively in the preparation or in the adoption of it held places, either upon the bench of the national or state judiciary or else at the bar, this section received repeated considerations and constructions, by different tribunals of the highest credit; and these have been repeated, at short intervals, until the present time.

4. In the Maryland Court of Appeals,¹² a question arose in regard to the right of issuing process of attachment against non-residents only. The true extent and construction of this article of the Constitution was the turning-point in the case, and it was argued most elaborately and with the greatest learning and ability. In giving judgment, the court said this provision in the United States Constitution had reference to the right of acquiring and holding property, and its beneficial enjoyment in the several states,

¹¹ Story on the Const. § 1806; *Abbott v. Bayley*, 6 Pick. 92; *Corifield v. Coryell*, 4 Wash. C. C. 371.

¹² *Campbell v. Morris*, 3 Harris & McHenry, 535 (1797).

by the citizens of any of the other states. "And that such property shall be protected and secured by the laws of the state in the same manner the property of the citizens is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizen is not subject to." And in another case before the same court (1799), the same subject is again very carefully re-examined, and the same views reaffirmed.¹³ The court, in defining the extent of this provision in the national Constitution, say: It guarantees "that the citizens of all the states shall have and enjoy the peculiar advantages of acquiring and holding real as well as personal property, and that the same shall be protected and secured by the laws of the state in the same manner the property of the citizens is protected. That it shall not be liable to any taxes or burdens which the property of the citizen is not subject to, and on the same footing in the payment of the debts of deceased debtors with creditors living in the state."

5. Mr. Justice *Washington*,¹⁴ in defining the true limits and proper construction of this provision, says: It must have reference to such "privileges and immunities" as are "fundamental" in their character, such as acquiring and enjoying property. "And an exemption from higher taxes and impositions than are paid by the other citizens of the state:" i. e., that residents and non-residents, when they are citizens of the United States, and by consequence citizens of each particular state, shall only be subject to the same taxes upon the same class of property. These, adds the learned judge, are among "the particular privileges and immunities that are clearly embraced" in the provision.

6. The Court of Appeals in Virginia took a similar view of this provision.¹⁵ So also in the State of Kentucky.¹⁶ And in Sergeant's Constitutional Law, p. 329, the learned author takes the same view of this provision in the Constitution of the United States, as being clearly established, both by judicial construction and general acquiescence. The commentaries of this learned jurist upon American constitutional law have in themselves almost the weight of judicial authority.

7. In Alabama,¹⁷ it is expressly decided that a statute taxing

¹³ *Ward v. Morris*, 4 Harris & McHenry, 330, 340.

¹⁴ *Corfield v. Coryell*, *supra*.

¹⁵ *Murray v. McCarty*, 2 Munf. 393, 398.

¹⁶ *Amy v. Smith*, 1 Litt. 326; *Commonwealth v. Griffin*, 3 B. Mon. 211.

¹⁷ *Wiley v. Farmer*, 14 Ala. 627.

slaves of non-residents higher (in this case twice as high) as those of resident citizens, is contrary to the provisions of the United States Constitution, and void for the excess. The court query, in this case, whether some discrimination may not be made in such cases, upon the ground of police, but are clear it cannot be done as matter of taxation; nor can an imposition for purposes of taxation merely be supported by referring it to the police powers of the state. The proceeding must be in good faith, and imposed for the purposes professed; and if vindicated at all, it must be done upon the grounds of its adoption, and not by way of evasion. There is a very obvious distinction between taxation and the police power of the state. And it is easy to determine the primary and leading purpose of a levy upon property; and whether that is revenue, or the correction of evil habits and practices, and the maintenance of order and good government in the state. In short, whether the matter of revenue is the main thing looked after, or is merely incidental and accidental, and the main purpose and design of making the imposition is corrective and punitive. But we have no apprehension it will be claimed that this tax was imposed to compel non-resident share-holders to sell their stock, although it may have that tendency.

8. It will thus be obvious, we apprehend, that the force of this provision in the national Constitution is settled by a uniform course of decision from near the date of its adoption to the present time, and that there is no conflict of opinion among courts or jurists in regard to it. We must therefore conclude that all persons who are citizens of any one of the United States, and own property in any other state, are entitled to precisely the same protection in regard to taxation, as well as in every other respect, as if they resided within the state where the property is situated.

V. It is unquestionable, we think, that this indemnity extends not only to the amount of taxation, but to the principle or mode of its levy.

1. It is the principle of taxation which is often more important than the amount. For if we admit that the legislature may adopt a different mode of taxing the property of non-resident citizens from that which they apply to residents, there is far more danger of its abuse than in regard to residents, since the latter are represented in the legislature, and are really its constituents, and are only taxing themselves through their representatives. There is,

therefore, no great danger that any course of taxation as applied to resident citizens would be likely to be carried to any destructive extent. But in regard to non-residents, if the principle and mode of levy was entirely different from that which was made to operate upon the resident citizens, and consequently could create no resistance or remonstrance from any one within the state or represented in the legislature, even when carried to the most destructive limit, as to the property of non-residents, it will be apparent that the necessity of subjecting all persons, resident or non-resident, to the same principle of taxation, is more indispensable to the fair protection of non-residents than of residents even. And we have already seen that the residents of every section of the state or district upon which the tax is levied are entitled to insist that it shall be levied in the same mode upon all property of the same class. Much more, then, is this true of the property of non-resident citizens.

2. But this applies with great force to the different interests in corporate property, and especially to the share-holders. The interest of a share-holder is personal to the owner, and is taxable to the owner, as matter of income, in the place of his domicile, and nowhere else. The interest or right of a share-holder in a corporation is well defined by *Shaw, C. J.*¹⁸ "The right is, strictly speaking, the right to participate, in a certain proportion, in the immunities and benefits of the corporation." This is a right or property, as distinct from the capital stock of the company, or property of the company, as a debt is distinct from the debtor, or the mortgaged debt from the mortgaged premises. The debt, whether secured by mortgage or not, and although it may fully equal and thus represent all the property of the debtor, is nevertheless liable to be taxed to the creditor, notwithstanding all the property which it represents, and which forms the entire basis of its security, may also have been taxed to the debtor. And this is, in no just sense, double taxation. And the same thing would be equally true, although the debt existed only against property, either real or personal, no debtor being bound personally for its payment. For one thousand dollars of property, or money, there may be ten notes or bills, as between the successive owners through whom the title may have passed, each one of which, as a source of

¹⁸ *Fisher v. The Essex Bank*, 5 Gray, 373.

income, is taxable to the holder, and the property also taxable to the ultimate purchaser.

3. But, as we have already said, as to share-holders' interests, and all choses in action, they are personal to the creditor, and only taxable in the place of his domicile. The creditor cannot be taxed in the place of the domicile of the debtor unless he resides there, nor can the debtor be taxed for the debt, and allowed to deduct the tax from the debt. Nor can a tax against the creditor be imposed upon the property which is pledged or mortgaged to secure a debt, and thus made to apply towards the payment of the debt. The legislature has no power to tax choses in action held by non-residents. They are altogether beyond their jurisdiction.¹⁹ The case last referred to decides that non-resident share-holders cannot be taxed for their shares. And it is well said here, by an able and experienced judge, that the attempt to do it "tends to weaken the bonds of the Union, by discouraging commercial intercourse and commercial relations."

4. And it is not important to the right of taxation, on account of income derivable from choses in action, that the debtors should reside within the state, or that the debt is dependent alone upon property situate without the state.²⁰ And so the resident owner of shares in a foreign corporation may be taxed in the place of his domicile on account of it, notwithstanding any tax the corporation may be subjected to in the state where it exists, whether it be a tax upon its business or franchise, or upon its capital or property.²¹

5. The *situs* of the shares in a corporation, for purposes of taxation, and indeed for most if not for all purposes, is that of the domicile of the owner. In the *City of Evansville v. Hall*,²² it is said that the *situs* of the shares of an insurance company, at least for purposes of taxation, is the domicile of the owner. And although the Indiana cases seem to treat the shares and capital stock as nearly identical, which, as we shall soon see, is a fallacy,

¹⁹ *Richmond v. Daniel*, 14 Grattan, 385; *State v. Ross*, 3 Zab. 517.

²⁰ *People v. The Commissioners*, 33 Barb. 116.

²¹ *State v. Branin*, *supra*. See also *The Tax Cases*, 12 Gill & Johns. 117; *The Heirs of Deming v. Selectmen of Burlington*, Sup. Ct. Vt. in Chit. Co., 1836, not reported, *Phelps, J.*; *State v. Manchester*, 1 Dutcher, 531, where it is held that bonds secured by mortgage upon lands in another state are taxable to the holders, notwithstanding the lands are taxed where situated.

²² 14 Ind. 27.

yet even there, a statute imposing a tax upon the "stock" of railways was construed to import the property of the corporation.²³

6. It may be well to state here, that, notwithstanding the control of corporations is dependent upon the ownership of the shares, the *title* of the shares and the *title* to the property of the corporation, which represents the capital stock with which it is purchased, is entirely distinct.²⁴ And there is no case, or class of cases, of any authority, wherein the shares and the capital stock or property of the corporation are held to be identical, or substantially so except:

7. In regard to *exemptions* of corporations from taxation. It is now well settled, after a good deal of debate and some conflict of decision, that an exemption from taxation of a corporation, which is contemporaneous with its charter, whether it is procured by the payment of a bonus, or is merely gratuitous on the part of the state, if it form one of the conditions of the grant, thereby becomes perpetually binding upon the state, and irrevocable.²⁵ In this case the bank paid a bonus to obtain its charter, and the charter contained a stipulation "not to impose any further tax or burden upon them during the continuance of their charter." This was held to exempt the stockholders from all taxation on account of their shares in the capital stock. This was a very just and proper construction of such an exemption from taxation. For although in strictness it was giving the exemption an extension beyond the fair import of the words used, it no doubt met the purpose and intent of the parties to the contract more fully than any other. And as it is not common to tax the corporation for its property or franchise, and at the same time tax the share-holders; if such an exemption from taxation was not held to extend to both, it would prove of no practical avail to the grantees; since all the tax which is ordinarily levied upon both might still be levied upon the share-holders, and thus the exemption be rendered futile. Hence the cases have finally adopted this view.²⁶

²³ *Floyd Co. Auditor v. New Albany & Salem Railw.*, 11 Ind. 570; *Conwell v. Connersville*, 15 Ind. 150.

²⁴ *Wheelock v. Moulton*, 15 Vt. 519.

²⁵ *Gordon v. The Appeal Tax Court*, 3 How. (U. S.) 133.

²⁶ There are many cases of credit which maintain the want of power in the legislature to exempt corporations or property perpetually from taxation. *Debolt v. Ohio Ins. & Trust Co.*, 1 Ohio St. 563; *Knoup v. Piqua Bank*, id. 603; *Canal Commissioners v. Penn. Railw.*, 5 Law Reg. 623; *Brewster v. Hough*, 10 N. H. 133; *State Bank of Ohio v. Knoop*, 16 How. (U. S.) 369; *Woolsey v. Dodge*, 6 McLean, 142; *Alle-*

8. We see no ground to question this construction of an exemption from taxation in order to make it carry that beneficial interest to the grantee which it was intended to give. But when it is attempted to argue that any tax imposed upon any more than one of these forms of corporate property is double taxation, and therefore void on that account, it is carrying the proposition further than either principle or authority will warrant. And hence, when it is said that "the stock of a bank being the representation of its whole property, when the shares have been taxed to the owners, the real and personal estate of the bank becomes exempt from taxation; to tax both its real and personal estate and its stock would be double taxation, and therefore illegal and unjust;"²⁷ there is such a want of clearness in the legal propositions involved, and they are so mixed and complicated, that one scarcely knows whether to admit or deny them.²⁸

9. As we have already said, there is no more double taxation in taxing the corporation, and at the same time taxing the shares to the holders, than in taxing the mortgagee for the mortgage debt, and at the same time taxing the land by which it is secured to the debtor. There is undoubtedly a kind of injustice in taxing the property, or stock of a corporation to the corporation, and at the same time taxing the corporators, for their shares in the corporate stock. It is, in an equitable light, much the same thing as taxing a copartnership for all its property and business, and at the same time taxing the separate partners for their shares in the capital stock. But in strict legal principle it is different, because the corporation is a distinct legal person from any or all the corporators, and as such is, in strict legal right, liable to taxation for all its property, for its faculty and for income, the same as a natural person.

10. The result of this is that the corporation may be made taxable at the place of its residence, or principal office, for its faculty

ghany County *v.* Shoenbergher, 1 Grant's Cases, 35; Johnson *v.* Conner, 7 Dana, 342; Tax Cases, 12 Gill & J. 117; Gordon's Ex'rs *v.* Baltimore, 5 Gill, 236; Smith *v.* Burley, 9 N. H. 423; State *v.* Powers, 4 Zab. 400; Eastern Bank *v.* Commonwealth, 10 Barr, 442. And in Smith *v.* Exeter, 37 N. H. 556, it was held that the taxation of the corporation for its property was equivalent to taxing the shares, upon the question of subjecting the owner to a tax on account of his shares, unless they had been already taxed.

²⁷ Gordon, Ex'r, *v.* Baltimore, 5 Gill, 236.

²⁸ Smith *v.* Burley, 9 N. H. 423; Bank of Cape Fear *v.* Edwards, 5 Ired. 516.

or franchise ; for its income, and all its choses in action, as well as its personal property in possession ; but this is not common. And for real estate it is taxable at the place where the estate is situated.²⁹ And the same principle has been applied to a corporation extending into different states.³⁰ But as we have often before said, the taxable quality of the shares arises solely from the supposed income arising therefrom, and has no reference whatever to the estate of the corporation, but solely to the domicile of the holder or owner, and is taxable to the owner in the place of his domicile, without reference to any tax imposed upon the corporation, its property, or capital. And the fact that there is injustice in taxing both will not affect its legality, if the principle of the tax is legal and the intent is clear. For all taxation may be carried to the extent of becoming unjust, without becoming illegal, so long as it preserves the proper principle of taxation.

11. So that neither the injustice or the unusual character of taxation will avoid its legal binding force. It must be vicious in principle, and thus virtually lose its character of taxation, in order to become invalid. In *State v. Branin*, *supra*, it is said : “ The stock of an incorporated bank, although the bank pays a tax upon its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax upon the same property.” — “ Double taxation may be unequal, oppressive, and unjust, but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature, and courts cannot declare such a statute void, because it may be unjust or oppressive.”³¹ The reasoning of the court here is entirely sound, except that they give the character of the case a wrong appellation. It is not strictly double taxation. For if it were it would be illegal. The legislature can no more tax the same property twice, for the same thing, than it can tax it twice as much as other property of the same description. This is self-evident, and requires no proof. For instance, the capital stock of a corporation is all invested in property, so that its capital and property become identical. No one will admit for a moment that the legislature could tax both for the same thing. But they may unquestionably tax the corporation and

²⁹ *Salem Iron-Factory Co. v. Danvers*, 10 Mass. 514 ; *Amesbury W. & C. Man. Co. v. Amesbury*, 17 Mass. 461 ; 4 Met. 184 ; 3 Greenl. 133 ; 9 Met. 199.

³⁰ *Easton Bridge Co. v. The County*, 9 Barr, 415.

³¹ See also *The State v. Newark*, 1 Dutcher, 315.

the share-holders at the same time for the same general tax, and it is not double taxation in any just sense.

12. Hence, if we admit that the tax required to be paid by this statute is really a tax upon the capital of the railways, or a portion of it, it will not exempt the shares from taxation to the owner, let him reside where he may ; and it is therefore strictly a tax in addition to that which is imposed upon resident owners. For the tax upon the owner of shares in the place of his domicile is not legally affected by any tax imposed upon the corporation, whether it be a domestic or foreign corporation.³² And when the other statutes of the State of Vermont make the liability of the holder of shares in foreign corporations to taxation dependent upon the fact that such stock is not taxed to the corporation, it is matter of indulgence merely, and nothing which the owner of the shares could insist upon as matter of exemption from taxation, independent of the statute. Neither can the owners of Vermont railway stock, residing abroad, claim exemption from taxation on account of it, at the place of their domicile, because of paying this tax in Vermont.

13. The great objection, in principle, to a tax of this kind is, that it is a special imposition upon the property interests of non-residents, and not a tax upon such property in common with the other property in the state of a similar character. And if this principle is defensible, it gives the legislature the power to annihilate the property, at any moment, without in any way affecting the property of resident citizens, so that the destruction of this class of property, or its essential destruction by way of taxation, is a thing not of improbable occurrence if this mode of taxation be legal ; while if it were taxed in common with all similar property in the state, it is scarcely supposable that any such thing could occur. It is this principle of taxation against which the decisions of the National Supreme Court, as to the U. S. Bank and U. S. stocks have been directed.³³

VI. We have thus shown, we think, very conclusively, —

1. That a non-resident cannot be taxed in Vermont upon shares he may own in a corporation in Vermont any more than he could if the corporation were in the place of his domicile ; the right to tax in such case being, as for a chose in action, which is the source of

³² *State v. Manchester, supra.*

³³ *McCulloch v. Maryland, supra* ; *Osborn v. Bank of U.S., infra* ; *Weston v. Charleston*, 2 Pet. U. S. 449.

income, and this being altogether independent of the locality of the ultimate power or force producing the income, and having no *situs* except that of the domicile of the owner.

2. That the United States Constitution secures to all citizens of the United States equality of taxation with resident citizens, both as to the amount and the mode, or principle of its levy, whenever they may own property in the state.

3. That this statute, while it is in reality an attempt to compel non-resident share-holders to pay a tax upon their shares in the State of Vermont, when such property is in fact taxable nowhere else but in the place of the domicile of the owner or holder, assumes the form of a levy upon the corporation as to that portion of its capital stock only which is held by non-residents.

4. This is entirely inadmissible. The state might as well tax the holders of shares in one county, and tax the corporation for the proportion of their stock held by the inhabitants of another county, when the tax itself extended throughout the state. The very principle of taxation, as we have said, requires that the levy be uniform upon all property of the same class. The state cannot therefore levy a tax of one per cent upon half the capital stock of a corporation, and a less or larger amount, or none at all, upon the other half. It might just as well be required that neat cattle upon one side of a river or highway should be taxed twice as much as upon the other side. The very principle of all taxation secures entire uniformity to the extent that the same class of property shall be taxed in the same mode throughout the district upon which the tax is levied. And where the constitution of the state provided "*that the rule of taxation shall be uniform*, and taxes shall be levied upon such property as the legislature shall prescribe," it was held³⁴ that a statute imposing a tax of *one per cent* upon the capital stock of plank-road companies, and requiring them to pay the same into the treasury of the state, *in lieu of all other taxes*, was in conflict with this provision of the Constitution, and void. But this constitutional provision in Wisconsin only placed all property upon the same basis which the principle of taxation does each particular class of property everywhere. The case is therefore precisely in point.

5. And it is no excuse for this irregular mode of levy, that the

³⁴ Attorney General *v.* Winnebago Lake and Fox River Plank-road Co, 11 Wisc. 35.

owners of a portion of the capital stock are not within the state, so that they can be reached in the mode in which resident owners of the stock are taxed. As to a tax upon the shares, as choses in action and the source of income, the legislature of Vermont have no right to tax those which belong to non-resident citizens, because they are not here, but in a foreign jurisdiction, of which they have no control or any right to levy taxes upon them. And as to the property or capital stock, or the franchise of the corporation, which is within their jurisdiction, they may undoubtedly tax either, or both, in their discretion. But if they do not choose to do it, so far as the resident owners of the shares are concerned, the towns, through their influence in the legislature, requiring that it be distributed according to ownership for the purposes of taxation, and not all taxed in mass to the corporation in the place of its principal office, or if for any cause they cannot obtain an act to levy taxes directly upon the corporation as to *all* the stockholders, neither can they do it as to *any* who are citizens of the United States, — the Constitution of the United States having secured uniformity of taxation to them in common with the resident citizens. How it might be as to shares owned by non-resident aliens, it is not necessary to inquire. It is not clear in my mind that a levy *in this form* would be valid, even where shares were held by non-resident aliens.

6. It is a levy upon the corporation, to be paid by non-resident share-holders who have no notice of the proceedings, and where the whole proceedings are without any jurisdiction over them. It has been held that such a levy is void upon general principles, it being in the nature of a decree of forfeiture or confiscation of property, or the profits or a portion of them; and the principle would be the same if it went the whole extent of all the profits or all the property; and this wholly without jurisdiction. It seems nothing less than an arbitrary appropriation of private property, belonging to citizens resident abroad, to the public use of the state, when the owners are not notified of the proceedings or represented in the legislature. It was expressly decided,³⁵ that the bonds of the corporations of that state, or the stock of such corporations, any of which are owned by inhabitants of another state, are not liable to taxation in the State of New Jersey. And this seems to bring the question of jurisdiction, for purposes of taxation, over shares in

³⁵ State v. Ross, 3 Zab. 517.

joint-stock companies, to the true point. It holds truly, that as sources of income, they are properly taxable to the holder, but not to the corporation, any more than debts are taxable to the debtor.³⁶ For shares in a joint-stock company, being the right to share in the surplus after all other liabilities are cancelled, are in the nature of a debt, conditional, indeed, but really a mere chose in action. But the shares are not the property of the corporation, or taxable to them. It was accordingly held,³⁷ that the corporation is not liable to be taxed upon the shares of non-resident owners, and that, if they pay such a tax, they cannot retain it out of dividends declared upon such shares. The company having no control over the shares, and no agency on behalf of the owners, any such payment must be regarded as voluntary. And the mere color of legislative or judicial proceedings, wholly without jurisdiction, will not render the payment compulsory, in the view of the law. So in *Hood's Estate*, 21 Penn. State, 106, it was held that a collateral inheritance, where neither the property taxed nor the domicile of the ancestor was within the state, could not legally be taxed there.

VII. We conclude therefore that this imposition, as a tax, is void for many reasons and upon many grounds.

1. If it be attempted to be justified as a mode of taxing the non-resident stock and resident equally, it wholly fails of any such purpose, since the tax is much more in amount than is ever required of residents for any purposes of state taxes. And it would scarcely be claimed that the state could collect for their own use town and county taxes from persons who belong to no town or county in the state. And if it were ever so small, that would not make it legal, if levied in this mode.

2. In a book³⁸ of high credit, and which has been often quoted with approbation by the courts in this country, it is said: "The general rule appears clearly to be, . . . every person is liable to be assessed for his personal property in the state of which he is an inhabitant; and stock owned in incorporated banks, &c., by non-resident holders thereof, *is not subject to the taxing power of the state*. Indeed the stock is not a thing capable in itself of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity *confined to the person*

³⁶ *The People v. Commissioners*, 33 Barb. 116.

³⁷ *State v. Thomas*, 2 Dutcher, 181.

³⁸ Angell & Ames on Corp. § 458.

*of the owner, who, if he be a non-resident, is beyond the jurisdiction of the state, and not subject to its laws."*³⁹

3. As a tax upon the portion of the capital stock of the railways represented by the shares of non-residents, it may justly be said that the shares do not represent any particular portion of the capital stock. But if we were to admit that the share-holders are tenants in common of the capital stock, which is not true in any strict legal sense of title, we still encounter the fatal irregularity so often before alluded to, of taxing the interest of one tenant in common *upon a totally different principle* from that which we apply to the interest of other tenants, which seems at war with all just notions of taxation.

4. If it be well founded in law, that the legislatures of the several states possess the power to tax property within their limits, belonging to citizens of the other American states not resident in the state where they hold property, upon principles altogether distinct from that upon which they tax the same class of property belonging to resident citizens, then indeed are the property-rights of non-resident citizens wholly at the mercy of such legislature, with no check or control whatever, which we think we have sufficiently disproved, as being at war both with the general principles of taxation, and the fundamental principles of the United States Constitution.

VIII. In regard to the right of these non-resident citizens and share-holders to obtain an injunction out of chancery, in the Circuit Court of the United States, restraining the treasurer of the company from paying over any such tax as is required by the statute to the treasurer of the state out of the dividends upon these shares, or against the treasurer of the state from taking proceedings to enforce the tax, we think there can be no question whatever. It seems to be almost the very point decided in *Osborne v. The Bank of the United States*.⁴⁰ The Circuit Courts of the United States possess full jurisdiction in the case, on account of the non-residence of the plaintiffs, and the subject-matter of the imposition being in violation of the guaranties of the United States Constitution, which it is the especial duty of the Federal Courts to vindicate

³⁹ *Union Bank of Tennessee v. The State*, 9 Yerg. 490.

⁴⁰ 9 Wheaton, 738. The legislature cannot pass a law to govern a particular case. It is a mere decree. *Holden v. James*, 11 Mass. 496.

and enforce, it seems highly proper they should be appealed to in regard to it. There can be no question, therefore, in my judgment, either in regard to the right or the remedy.

POWER OF THE LEGISLATURE TO MODIFY THE CHARTER OF TRINITY CHURCH, NEW YORK.

1. The real question involved in the whole case, is settled by the act of 1814.
- I. Was Trinity Church, in 1814, a private corporation ?
 1. This question has been evaded, by calling the property of Trinity Church a trust. But the same question arises in regard to a trust, as in regard to a corporation, whether it is public or private.
 2. Eleemosynary corporations, colleges, academies, and churches are private.
 3. Distinctions between public and private schools.
 4. 5, 6, 7. Law of the Dartmouth College case stated.
 8. Analogy between that case and this stated ; and other similar cases referred to, and the analogy between college and academic corporations and churches stated.
 9. Definition of a public college or university.
 10. Definition of a private college or university.
- II. Trinity Church being a private eleemosynary corporation, it did not become subject to legislative control, because the principal fund arose from a royal grant.
 1. Public grants to private corporations have always been common.
 2. They impose no different duties from private grants.
 3. Public colleges and academies may exist.
 4. Parish churches in England, public corporations, but the parish system never transplanted into the colonies.
 5. Conclusion, that Trinity Church is in all respects a private corporation.
- III. Charter viewed as a contract.
 1. Every amendment is also a contract, when accepted.
 2. Cases upon the subject reviewed.
- IV. How far such charters are subject to repeal, alteration, or amendment, by the legislature.
 - 1, 2. The authority and application of the case of Dartmouth College *v.* Woodward stated.
 3. Other cases in the United States Supreme Court stated.
 4. The law of the cases in the State Courts discussed.
 5. Case of Louisville *v.* The University.
 - 6, 7, 8, 9. The law and the evidence concur in one result, that the State legislature have no control over this corporation, and never exercised or claimed any such control.
- V. Is the proposed alteration of the charter a violation of the corporate rights ?
 1. No franchise of a private corporation more vital than that of self-government.
 2. No security to the corporation that the legislature will not do injustice.
 3. No justification for doing injustice to Trinity Church, that some great good is proposed to be thereby effected.

4. Or that the funds might be more wisely managed.
5. Or that the petitioners act in good faith.
6. It is easy for men to commit the most flagrant outrages upon private right, in most perfect good faith.
7. These illustrations may seem not likely to occur, but from the past we know not what to expect.
8. It may be said a void law can do but little injury.
1, 2, 3, 4. But it does much, in many ways.
- VI. Questions incidental to the main inquiry.
 - i. 1, 2, 3, 4, 5. The relations and duties of the corporation, and of the *cestuis que trust*, in reference to their rights and duties discussed.
 - ii. But if all that is claimed in regard to the facts is conceded, the act of 1814 did not impair any vested right.
 - iii. Non-parishioners never had the right to vote in the elections in Trinity Church.
 - iv. Extent of the visitatorial power.

OPINION.

THE following opinion, prepared at the request of the vestry of Trinity Church, New York, as it contains our own view of the law of one of the most important controversies in regard to property, both in amount and in the character of the questions involved, which has arisen in the country, and as it was, at the time, immediately acquiesced in by a very numerous, learned and influential opposing interest, and has hitherto continued to be thus acquiesced in, and as many of the suggestions here made, although made more than ten years ago, have a striking significance at the present time, when the Constitution of the government is undergoing very marked changes, both by formal amendments and new constructions, we have thought we could present nothing more acceptable to the profession, and we are sure that no plea in favor of the inviolability of the written law could be more temperate, or earnest, or sincere.

In preparing an opinion upon the law of this case, I have endeavored to pursue the same course I should have done were the case before me judicially. The principal difference of which I have been conscious was the want of formal argument before me, when I could direct the attention of counsel to those points upon which I specially desired elucidation. This want has been, to a considerable extent, supplied by the arguments before former committees of the New York legislature, and the reports of the majority and minority of some of these committees upon the several points involved. I have prefaced my opinion with no statement of facts, because they all appear in documents already in print, and

a repetition of them here would only extend the opinion, to no useful purpose.

1. It seems to me that the discussions before the committees of the New York legislature, as is common before such bodies, took a much wider range than is necessary or desirable. I shall, therefore, confine myself mainly to those points which seem to me decisive of the rights of the parties. In this view it seems to me, as the controversy all turns upon the question of repealing or modifying the act of 1814, in relation to the charter of this church, that we may lay out of the case all extended examination of the rights of this corporation before the date of the act in question. For even if the corporation possessed the same rights before that act which it does under it, the repeal is not unimportant. I shall assume as unquestionable that the act of 1814 did constitute, or, more specifically define, an important franchise of the charter of this corporation. I mean the essential franchise of the qualification of its electoral body. And it will render the act of 1814 scarcely less important, if we admit that the corporation possessed substantially the same electoral franchise before that it did after that act. For the clear definition of an important franchise is as essential a grant as its creation.

I. The only inquiry, behind the act of 1814, important to the estimate of the inviolability of the corporate franchises of Trinity Church, is whether that church was justly to be regarded as a private corporation, or was to be treated as a public corporation.

The council of revision, consisting of some of the ablest jurists the state has ever had, having the law of 1814 under consideration, assume as matter of course that the charter is a "private grant," and one of the objections made to the act is based upon that ground alone. No question whatever seems to have been then made upon this point as matter of fact. And I am not aware that this has ever been seriously questioned by any one.

1. But from the discussions which seem to have arisen before the committees and among the different members, I infer that it has been attempted to be maintained, that the corporation have only a trust estate in the property granted to them, and that this is a trust of so public a character as to be subject to legislative control. This argument, if it has any just foundation, must rest upon the distinction between public and private corporations. For all corporate property is, in one sense, held in trust. It is a trust

for the benefit of the shareholders in the case of private joint-stock corporations. It is upon this ground that the directors of such companies are not allowed to contract obligations in conflict with the interests of the company which they represent.¹

2. There is also a species of eleemosynary corporation, very numerous in this country, and whose creation is chiefly for the discharge of certain trusts connected with the general purposes of education and religion, which are of such vital importance to the general welfare, as scarcely to be surpassed in that respect by any other class of trusts, however public in their character, and which we are on that account apt to conclude must of necessity come under the class of public trusts. Under this class may be mentioned here incorporated schools, such as colleges and academies and incorporated churches, like the one which we are now examining. We have examined the subject as applicable to corporations for purposes of education very much at length, because the cases are numerous and the subject precisely parallel to that of charitable and religious corporations. Many persons, making no very clear discrimination between the public schools which are maintained in many of the states as a part of the general burden of taxation, and the class of schools referred to, whose support comes from funds accumulated both from private and public munificence, are liable to confound or to identify the two classes of schools.

3. But they are nevertheless wholly distinct upon the point in question. Those public schools which are maintained by general or local taxation are public corporations, and in all respects subject to the control of the legislature. It will make no difference in that respect that the corporate bodies, whether towns or districts, which have the control and support the burden of maintaining these schools, may also derive funds for this purpose from private charity. If they do, as is sometimes the case, this does

¹ *Ante*, §§ 140, 211, and numerous cases there cited. *Davidson v. Seymour et al.*, Law Reporter, July, 1857, p. 159; *Redmond v. Dickerson*, 1 Stockton, Ch. 507; *Fawcett v. Whitehouse*, 1 Russ. & M. 132; *Charitable Corporation v. Sutton*, 2 Atk. 400; *Marshall v. Baltimore & Ohio Railw.*, 16 Howard (U. S.), 314, 325; *Wood v. McCann*, 6 Dana, 366; *Hunt v. Test*, 8 Ala. 713; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *In re Robert W. Lowber v. The Mayor, Aldermen, & Commonalty of the City of New York*; and *In re A. C. Flagg*, Comptroller, and others, tax-payers, *v. Lowber*, *ante*, § 140, note to pl. 3; *Semmes v. Mayor, &c., of Columbus*, 19 Ga. 471.

not change the character of the corporation, or exempt it from legislative control. The property thus obtained would not be liable to be diverted by the legislature from the general object or scheme of the charity. But the corporation is nevertheless wholly under the control of the legislature to alter or repeal at will. And if the funds of Trinity Church were held by a public corporation, it would be competent for the legislature to control the corporation in the manner claimed, keeping the funds and appropriating the income fairly for the purposes contemplated by the donors. Public corporations are confined to municipalities, such as towns, school districts, &c., and corporations whose stock is owned by the state, and which are of course under legislative control.²

4. But the legislature have no such control over a private corporation which holds funds for the purposes of education or religion or general charity. And colleges and academies and churches in this government are of this character. This point is expressly decided in the leading case of *Dartmouth College v. Woodward*.³ The distinction between public and private corporations of this character is thus stated by Mr. Chief Justice Marshall, in the opinion of the court in that case. "If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States."

5. "But if this be a private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with government, whose funds are bestowed by individuals on the faith of the charter," &c., he concludes it is to be regarded as a private corporation for the administration of a charity in some sense of a public character.

6. In illustrating the subject further the learned judge adds, "That education is an object of national concern and a proper subject of legislation all admit. That there may be an institution undend by government and placed entirely under its immediate

² 1 Railw. 17 and cases cited.

³ 4 Wheaton, 518.

control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer?"

7. And in conclusion the learned judge says: "It appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves, that they are not public officers, nor is it a civil institution participating in the administration of government, but a charity school or a seminary of education, incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation."

8. Upon comparison it will be seen that all the incidents here enumerated apply to the condition of Trinity Church in 1814. The original charter was a royal grant made through the instrumentality of the local authorities, upon the petition of the corporators, and in the usual form of such incorporations, and with the ordinary corporate franchises of corporate action and perpetual succession. The authority of this case in regard to this point has never been questioned, but universally followed both in the national and state courts. See upon this point *Allen v. McKeen*,⁴ where it is said, "Bowdoin College is a private and not a public corporation, of which the Commonwealth of Massachusetts was the founder; and the visitatorial, and all other powers, franchises, and rights of property of the college are vested in the boards of trustees and overseers established by the charter, who have a permanent title to their offices, which can be divested only in the manner pointed out by the charter."⁵

9. In the case of the *University of Alabama v. Winston*,⁶ we have the definition of a public college or university. That was a case where all the funds of the college were public property, and all its officers, even the trustees, paid and appointed, either mediately or immediately by the state.

⁴ 1 Sumner, 276.

⁵ See also *Bracken v. William and Mary College*, 1 Call, 161, s. c. 3 Call, 573.

⁶ 5 Stew. & Porter, 17.

10. But in *University v. Foy*,⁷ and in *Den v. Foy*,⁸ a grant of land to the university is held to have created vested rights beyond the control of the legislature, on the ground that the University of North Carolina is a private corporation.⁹

II. It being then established that Trinity Church is a private eleemosynary corporation for the purpose of administering a charity, and that the legislature have ordinarily no control over the essential franchises of such a corporation, it can make no difference, as it seems to me, that the principal fund to be administered arose from a royal grant. (For Bowdoin College was endowed by a public grant from the State of Massachusetts.) It was not in the case of Trinity Church a grant contemporaneously with the charter, but made long after, so that the grant of the endowment cannot be said to qualify or characterize the grant of the corporate powers.

1. These public grants to private eleemosynary corporations were common both before and since the Revolution, and are still common. And no one supposes that because a college or an academy, or a church corporation receives a public grant of lands that it thereby becomes a public corporation subject to the control of the legislature, so that its charter may be altered or repealed at the will of the legislature. That is true of most of the colleges and academies in the different states, and it was never supposed that they thereby lost the right of private control and independent corporate action.

2. A public grant to a private corporation for the general purposes of its creation, which contains no conditions or reservations, is as much irrevocable and as really a gift beyond recall or control as any private grant made with the same incidents. And it imposes no more or different duties or responsibilities upon the donee from any private grant in the same terms. This proposition is fully maintained in the cases already cited.¹⁰ It is said in the case

⁷ 2 Haywood, 310, 374.

⁸ 1 Murph. 58.

⁹ See also upon this point, confirming the general doctrine claimed, *Wales v. Stetson*, 2 Mass. 146; *Parsons*, Ch. J.; *People v. Manhattan Co.*, 9 Wendell, 351; *Thomas v. Daniel*, 2 McCord, 354, admitting the same rule of construction after the Constitution of the United States came in force. *Yarmouth v. North Yarmouth*, 34 Maine, 411. The same is also held as to the University of Louisville, in *Louisville v. The University*, 15 B. Monroe, 642.

¹⁰ See also the Bowdoin College case, 1 Sumner, 276, and *University v. Louisville*, 15 B. Mon. 642. And in the *University of Maryland v. Williams*, 9 Gill & Johnson, 365, this point is expressly decided.

last referred to, "If a corporation be eleemosynary and private at first, no subsequent endowment of it by the state can change its character. It is not sufficient to render a corporation public that its ends are public."—"Colleges and academies for the promotion of piety and learning, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c., considered as private eleemosynary corporations."

3. In all this we do not intend to deny that public colleges and academies may be, and often are, created in this country. But that is, as we have seen, where the endowment is exclusively public and the control retained by the public. But a public church corporation in all the American states is incompatible with our institutions.

4. It was no doubt true under the English constitution, that the parishes in England were, and are still in some sense, public corporations and subject to parliamentary control. But the English church establishment, as such, does not extend to her Colonies. The parish system has never been transplanted there. And incorporations of churches in communion with the Church of England in the Colonies, were regarded the same as collegiate and academical incorporations, as being of a private and independent character; the same precisely as to their private character as would have been the incorporation of a Presbyterian or Lutheran congregation.

5. So that we may fairly conclude, beyond all question, that the parish of Trinity Church from its inception, was a private corporation wholly independent of all rightful legislative control, and that it has always been so regarded and treated. Not that the legislature under the English constitution did not possess the power to repeal or modify corporate charters, for it is well known the British parliament did possess that power; but it was never regarded as a power which could be rightfully exercised in the case of private corporations, except in extreme cases, as in the suppression of the Knights Templars and the Religious Houses under Henry the Eighth; and which it seems the present movement is designed to repeat in this country in defiance of the express provisions of the United States Constitution to the contrary. Such an attempt to inaugurate in the American states that most offensive doctrine of the omnipotence of parliament, in the place of

the limited authority which has been confided to our legislatures, cannot receive countenance from any judicious and dispassionate mind.

III. This church, then, being a private eleemosynary corporation, its charter was a contract within the protection of that provision of the United States Constitution which inhibits the states from passing laws impairing the obligation of contracts. And so, equally, is any essential amendment of the charter. For this quality of a charter of a private corporation rests upon the proposition mainly that the charter is a contract, inasmuch as it confers certain franchises and privileges upon the corporation, and in return requires certain duties of the corporation, which become obligatory only upon the acceptance of the charter by the corporators, which constitutes it essentially a contract.

1. It is also true of every amendment of the charter of a private corporation, conferring new franchises, or privileges, or upon new conditions, that it does not become binding upon the corporation, unless by the acceptance of the corporation. And the acceptance of an amendment of the charter of an eleemosynary corporation, by a majority, who for all purposes, in such corporations, represent both the corporation and the donors of its funds, is all that is ever required.¹¹

2. In the case of *Washington Bridge Co. v. The State of Connecticut*,¹² the point is expressly decided, that any enlargement of the charter of a private corporation, so accepted as to become binding, is the same, as to its inviolability, as if it had formed a part of the original grant.¹³ It is held, also, in the last named case, that a statute, very similar to the one asked for in the case of *Trinity Church*, is void, as being opposed to the fundamental principles of right and justice inherent in the nature and spirit of the social compact, independent of all express constitutional prohibition. This was the practical construction of the British con-

¹¹ *Louisville v. The University*, 15 B. Monroe, 681; *Ante*, 1 Railw. §§ 19, 20; *per Story, J.*, in *Dartmouth College v. Woodward*, 4 Wheaton, 518, 666, *et seq.* See also upon this point the following cases, fully sustaining the view here taken, *Rogers, J.*, in *Ehrenzeller v. Union Canal Co.*, 1 Rawle, 190; *Commissioners v. Jarvis*, 1 Monroe, 5.

¹² 18 Conn. 53.

¹³ The same principle is maintained in *Gordon v. The Appeal Tax Court*, 3 How. (U. S.) 133. See also *University of Maryland v. Williams*, 9 Gill & Johnson, 365, where the same views are maintained.

stitution, upon this particular point, and it is the only view which commends itself to our sense of justice and fair dealing. The last case referred to was that of an act incorporating the University of Maryland, and the subsequent act, declared void, proposed to create a new regency. In *Norris v. The Abington Academy*,¹⁴ it was held, that even where the corporation, in performance of the condition of an act of the legislature, enlarging its powers, and for a pecuniary consideration, had conveyed all their estate and effects to the state, that the legislature nevertheless could not vest the government of the corporation in a new board of trustees. And in Vermont, where the state, in the charter of towns, reserves one right of land for the use of a county grammar school, and had incorporated such a school, with power to receive the rents of such lands, it was held, they could not subsequently divert any portion of the rents, to the use of other similar schools, subsequently created.¹⁵

IV. The amendment of the charter of the corporation of Trinity Church then, in 1814, being the same as a new charter, we have only to inquire how far any such charter is subject to repeal, alteration, or amendment. This is the principal question discussed and determined in the case of *Dartmouth College v. Woodward*, already referred to. That was a case very similar, in many of its facts, to the present case. That was a controversy, in regard to the constitution of the governing body of the corporation. The professed purpose and object of that reform, as of all reforms, in popular governments, was to liberalize the institution. But the court held that the provision in the United States Constitution, against state laws, impairing the obligation of contracts, had reference to such reforms, and cut them up by the roots. And it is not too much to say that this decision and others in regard to the different application of the same principle, have done more to protect the essential pecuniary rights of the citizen, and especially in regard to corporate interests and franchises, against unjust encroachments, from whatever source, than any other ever made, by any judicial tribunal, in the country. It is one of the most indispensable barriers against legislative injustice, which was ever incorporated into the constitution of a great empire. And although not itself a new principle, its application to the charter and fran-

¹⁴ 7 Gill & Johnson, 7.

¹⁵ *Burt v. Caledonia County Grammar School*, 11 Vt. 632.

chises of private corporations was new, and it seems to me one of the most important safeguards to property and private rights which wisdom could have devised or justice defend and enforce ; and my surprise is that, in form even, it should have been unknown to the English constitution. And the cases which we have referred to, and may hereafter refer to, show very clearly, that the principle has been very strenuously adhered to, with a single exception hereafter referred to, by all the judicial tribunals of the country, since its first promulgation. And it is so plain, and so simple, in itself, as scarcely to admit of illustration or elucidation. But we shall refer briefly to some of the subsequent decisions, which have followed the leading case upon this subject, that of *Dartmouth College v. Woodward*.

1. The authority and principle of the decision may be thus stated, as was done by the court in *Thorpe v. Rut. & Bur. Railway*.¹⁶ "Upon this subject the decisions of the United States Supreme Court must be regarded as of paramount authority. And the case of *Dartmouth College v. Woodward*, being so much upon the very point now under consideration, and the leading case, and authoritative exposition of the Constitution, by the court of last resort, must be regarded as [altogether decisive of the law and] the common starting point" of all the decisions upon the subject.

2. Mr. Chief Justice *Marshall* there says, "A corporation is an artificial being,—the mere creature of the law,—it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." The case throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking, on the part of the state, that the corporation, as such, and for the purposes therein named, or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter.

3. The other cases in the United States Supreme Court, further illustrating and enforcing the same principle, as applied to private corporations, are not numerous. *Providence Bank v. Billings*,¹⁷ is in regard to the right to tax an existing corporation, its

¹⁶ 27 Vt. 140.

¹⁷ 4 Pet. 514.

charter containing no provision upon that subject. The court held the corporation could claim no exemption from taxation, except by express grant. In *Gordon v. The Appeal Tax Court*,¹⁸ it was held that such an express exemption from taxation, contained in the charter of the corporation, was perpetual, and inviolable by any act of the legislature. But if the charter of such corporation were extended, without any express provision in the act making the extension in regard to taxation, the right of taxation would revive. The cases of *State Bank v. Knoop*,¹⁹ *Ohio Life and Trust Company v. Debolt*,²⁰ are to the same effect. In *Planters' Bank of Mississippi v. Sharp*,²¹ it is held, that a law prohibiting any bank from transferring by indorsement, or otherwise, any note, bill receivable, or other evidence of debt, impairs the obligation of the charter of a bank, by which it is empowered to acquire and dispose of goods, chattels, and effects, of what kind soever, nature, and quality, and to discount bills and notes. It was also decided²² that a law, which deprived creditors of all legal remedy against a corporation, or its property, impairs the obligation and effect of its contracts, and is invalid.

It was attempted to be maintained, in the opinions of the state court, in deciding the cases,²³ that the charter of a private corporation, like a bank, is not a contract, within the meaning of the United States Constitution, prohibiting the legislatures of the several states from passing laws impairing the obligation of contracts, but an act of legislation which may be repealed whenever the legislature shall deem it expedient. But these cases were reversed, in the national tribunal of last resort, and the doctrine of the case of *Dartmouth College v. Woodward* reasserted, so late as 1855.²⁴

4. The general doctrine of the inviolability of corporate rights and franchises, so far as private corporations are concerned, and which are of a pecuniary character and quality, that is, are intended and calculated to affect property, is recognized in all the states where the question has arisen, unless Ohio form an excep-

¹⁸ 3 How. 133.

¹⁹ 16 How. 369.

²⁰ 16 How. 416.

²¹ 6 How. 305.

²² *Curran v. Arkansas*, 15 How. 304.

²³ *Mechanics' & Traders' Bank v. Debolt*, 1 Ohio St. 596, and in *Toledo Bank v. Bond*, 1 Ohio St. 622.

²⁴ *Dodge v. Woolsey*, 18 How. 331; *Mechanics' & Traders' Bank v. Debolt*, 18 How. 380, and *Same v. Thomas*, 18 How. 384.

tion. The cases cited in the note involve the discussion of that very point, more or less directly.²⁵

5. The distinction between the class of corporations, where the right of legislative control does, and where it does not exist, is well stated in the case of *Louisville v. The President & Trustees of the University*.²⁶ It is there held, that "the state does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, nor to control funds belonging to the state, nor to conduct transactions in which the state was alone interested."—"The legislature has such power over such corporations alone as may be characterized as the agents or instruments of the government."—"An University is not such a corporation, and funds bestowed upon it by a city are beyond legislative control. The original charter of the University of Louisville creates a private corporation, and so much of the amended charter of the city of Louisville as relates to the pre-existing charter and corporation of the University, and vests, or professes to vest, in a new corporation, or in new trustees, the property and privileges of the original corporation, is in violation of the United States Constitution, and void."

6. I might refer to other cases, involving the general question of the inviolability of corporate franchises, but I have selected only such cases as seemed to me directly in point, and to involve the very questions which I have discussed. And it will have been seen that the cases all concur in the leading point decided, in the case of *Dartmouth College v. Woodward*. These questions have arisen more frequently in regard to the chartered rights and franchises of colleges and academies, than in regard to those of churches. But the line of demarcation, between the classes of corporations, where the state does, and where it does not, retain legislative control, in corporations of every kind, is identical with that between public and private corporations. And it will not be claimed, by any one, that, in this government, churches have any

²⁵ *Commercial Bank v. The State*, 6 Smedes & Marshall, 599; *Commonwealth v. Cullen*, 13 Penn. St. 133; *Bank of the State v. The Bank of Cape Fear*, 13 Iredell, 75; *Brown v. Hammond*, 6 Penn. St. 86; *City of St. Louis v. Russell*, 9 Missouri, 507; *New Orleans, &c., Railw. v. Harris*, 27 Mississippi, 517; *Slack v. Maysville & Lexington Railw.*, 13 B. Mon. 1. See also *The People v. The Manhattan Co.*, 9 Wendell, 351; *Same v. The Supervisors of Westchester*, 4 Barb. 64.

²⁶ 15 B. Monroe, 642.

the slightest claim to be considered as public corporations, as political or civil institutions, like school districts, towns, and counties, in short, to be treated as the agents or instruments of government, and, therefore, under legislative control.

7. It seems to me therefore certain, beyond all question or doubt, that neither the state nor federal courts would sustain any act of the state legislature, in any sense modifying or enlarging the qualifications of the electors in the corporation of Trinity Church. I should therefore feel compelled to regard all such attempts as void, and all efforts from without to induce such legislation as indeed idle and frivolous, after the numerous decisions which have been made, by almost all the judicial tribunals of the country, with surprising unanimity, upon the very point in question.

8. And especially should I regard such efforts as strange and almost incomprehensible, upon any rational hypothesis, after an acquiescence of the corporation, and of the electors and the vestry, who are the corporators, and of all claiming an interest in the question, for more than forty years (twice the limit of prescription in regard to the gravest pecuniary rights), in the amended charter of 1814, clearly defining the qualification of the electors in the government of the corporation. In the case of the Episcopal Church *v.* The Newbern Academy,²⁷ it was held, that where the legislature by an act transferred the glebe land of the church to the academy, without the pretence of constitutional right to do so, the acquiescence of the church for thirty-five years concluded their title, notwithstanding the unconstitutionality of the act. It would be singular that a prescription should not apply in favor of a church corporation as well as against it.

9. That the legislature never regarded Trinity Church, in any sense, as a public corporation or under the patronage of the state, is clearly shown by the formal protest contained in the act of 1784 against any such conclusion, this being the first act passed by the legislature of the state in aid or amendment of the charter of that corporation.

V. It becomes important next to consider, whether the proposed qualification of the charter of this corporation is of a character to violate its essential franchises.

1. It must, we think, readily be admitted, that among the most

²⁷ 2 Hawks (N. C.), 233.

essential of corporate franchises, is that of self-government, according to the fundamental law of the charter. (And the idea of self-government, or free-will, according to, or in subserviency to, the will of the legislature, is certainly an anomaly, if not a solecism.) The right of the corporation to govern itself, according to the terms of its charter, was the very question involved in the case of Dartmouth College, and is the only question involved in this case. And if any franchise of corporate action can be regarded as vital, this may surely claim that character. The books enumerate many essential corporate franchises, such as succession during the term of the charter, the power to contract, to sue and be sued, by the corporate name, to hold land for the purposes of the incorporation, to have a common seal, the power of amotion, or removal of members, and some others, all of which are held inviolable under the United States Constitution. But none of these are so vital to the very existence of the corporation and the free exercise of its powers, as that of self-government, according to its charter. The denial of this involves the denial of all others, and may be made practically to absorb and destroy all others.

2. And it is no satisfactory answer to say, that it is not to be presumed, or indeed admitted, that the legislature would be guilty of injustice. It is not enough for the owner of property to be assured that his property or his rights, are taken from him for wise purposes, or towards the accomplishment of some greater good. This may be true, and it is but the plea of tyrants, great and small, single or combined, in all ages. It is doing evil that good may come ; it is the power of will, *ultima ratio regum*. And while such a plea is always false and disgraceful in principle, it is commonly so in fact, and never more so than in the present case.

3. And it affords no better vindication of the proposed usurpation, that this corporation is possessed of large funds, or that these funds might or were intended to subserve some wise and noble end, for mankind in general, or for those more immediately in the communion of this church ; or, that there is dissatisfaction in certain quarters, more or less interested in the disbursement of this charity. All this may be true, and the apparent apology which it affords for the interference only verifies the maxim, that mighty robbers acquire a certain degree of dignity, sometimes, from the very enormity of their offences, which in a measure redeems them from the contempt and disgrace which attaches to those whose

genius or experience only enables them to dabble in petty villanies ; and that, contrary to the popular maxim, that beggars should not be fastidious, they are sometimes more so, the more desperate their fortunes or their schemes, as a kind of excuse for the mode in which they pursue their vocation.

4. And if it could be shown that there has been indiscretion and want of wisdom and skill in the management or disbursement of this charity, or even positive negligence and misconduct in its administration, it could avail nothing towards the vindication of such an illegal usurpation by the legislature. If any such thing were pretended, which never was by any one entitled to credit or consideration, the means of redress are obvious and ample in the judicial tribunals of the country.

5. And although, in charity to the weakness and the bias of human judgment, I feel compelled to admit my belief that most of those concerned in this effort to remodel the charter of Trinity Church act in the most transparent simplicity and good faith, it is none the less an attempt to divest that corporation of her chartered rights, upon mere false pretences, through the aid of that natural or rather common prejudice which exists, in a considerably numerous class of minds, against religious corporations possessing large endowments, and belonging to a communion, not numerous, and not always exempt from unjust prejudice, upon other grounds, and especially exposed to such prejudice, when it is seen that the outcry comes from within that communion, which to those who do not observe the position, or the interested motives of those who are active in getting up such clamor, renders it doubly effective as a means of impeachment, when in fact it should be regarded as less so, for the very reason which renders it more so.

6. We know the facility with which ardent men deceive themselves in regard to the purity or disinterestedness of their own conduct. And the movers in this attack upon Trinity Church, renewed from year to year, with the apparent hope of extorting by their importunity what the justice of their case will always fail to command ; these men may deceive themselves, and verily believe they are attempting some great good ; but the legislature and the public should be aware that if they give to such attempts more than the merest formal courtesy which parliamentary etiquette requires, they themselves may some day expect to become

the victims of similar assaults upon private rights, when others shall apply the precedents thus made to the authors of them, and to their children, and thus justice shall commend the chalice which they now mingle to their own lips. They cannot forget that the humblest citizen, and the mightiest corporation, hold their pecuniary rights by the same tenure, the public sense of justice. The same act of legislation which distributes the property of Trinity Church for such objects and purposes as seem meet to the legislature, or, what is the same thing in principle, subjects it to control foreign to its charter, might also deprive the humblest citizen of his home, or his bed, or his Bible. And if the first is allowed now, the day will come when the others cannot be successfully resisted.

7. These may look like extreme points of illustration of the principle, and so not likely to occur, but in looking at some changes which have occurred in the last twenty years I cannot think so.

8. And it may be thought of no great importance that such an act should be passed by the legislature, if it is wholly void, since the courts of justice would readily declare it so. But there is serious detriment coming from such statutes, or even the slightest legislative countenance to such petitions.

1. It is unjust, and exposes those interested to needless and unjust expense. This of itself is reason enough why all such attempts should meet the decided condemnation of every honest man, and especially every public officer. And it seems idle to require, or to attempt to give further reasons against such practices, when we have shown them illegal and unjust.

2. But it should be remembered, that to countenance such attempts encourages perseverance in evil, at the hands of those who hope to make it a source of gain to themselves, as well as of vexation to others, in many ways not needful to be here enumerated.

3. And it should not be forgotten, by the grave and serious, that there is a point, beyond which neither courts of justice nor executive officers in popular governments can possibly protect either natural or artificial persons against popular outbreaks, in the form of factitious public opinion, which may be carried such lengths as to induce violence and outrage of the most irresistible character, and which is as readily manufactured for an occasion,

without just foundation, as with it. And often more readily, inasmuch as where there is real guilt, and abuse of power or trust, the more meddlesome become content to let the due administration of the law take its course. It is only from a consciousness that the law is against the claim of a party, that he is induced to resort to the extraordinary measures of invoking the aid of illegal and unprecedented legislation, and other similar unusual appliances.

4. And where the slightest encouragement is given to this species of legislative interference, it serves to keep alive public clamor, which, however groundless, is sure to do injury to the objects of it. This must be my apology for the brief allusion which I have made to the practical evils of such legislative applications, and especially when they have the effect to subject the petitionees to the expense and vexation of making formal defence.

VI. *Questions incidental to the Main Inquiry.*

I. 1. Something has been said in regard to the nature of the trust upon which Trinity Church holds her property. It has been shown that it is not one of those public trusts, created by the legislature as instruments of governmental administration, which are, by consequence, under legislative control.

2. We have before said that all corporations, even joint-stock companies, hold their property in trust. This, unexplained, might lead some to conclude that the *cestuis que trust*, in all cases of corporate property, possessed the right to interfere in the administration of the trust. That is so in the case of joint-stock companies, where the share-holders are the equitable owners of the corporation, and the only *cestuis que trust*.

3. But the case of an eleemosynary corporation, created for the perpetual administration of a private charity, is a trust of a very different character from either a public corporation or a private joint-stock corporation. It is, in some sense, of an intermediate class between the two. It cannot, however, with any show of reason or argument, be maintained that, in the case of a public charity, like Trinity Church, the *cestuis que trust* have any vested interest in its disbursement which courts of justice could recognize, or which could be said to be violated, by any amendment of the charter of the corporation accepted by them, as in the act of

1814. The objects of a public charity, when not limited or defined, are absolutely unlimited, and, from the very nature of the grant, include the whole world. The duty of the almoners of such a bounty or charity is co-extensive with the cardinal moral virtue of benevolence. It is to do good unto all men as they have opportunity, and, in the case of a church charity, especially to such as are of the household of faith.

4. It could not, with any show of plausibility, be claimed that such a scheme of charity could be enforced by a bill in equity, at the suit of all or a representative portion of the beneficiaries of the charity. This could only be done by some conventional representative of the public in general, as the Attorney-General in England. Not because the corporation is a public one, but because the misapplication of its funds, in the case of any private charitable corporation, is a public offence, a breach of trust, which a court of equity will redress, at the suit of any proper formal representative of the public, against which this breach of trust is a *quasi* offence.

5. We have alluded to this point here to show that there is no ground of pretence that any vested rights were violated in the amendment of the charter of Trinity Church in 1814, by consent of the corporation. The right to a participation in the fruits of this charity was not of the class of vested legal rights, but of that class of imperfect rights, the obligation of which can only be enforced in the forum of conscience.

II. But if we admit all that is claimed in regard to the right of non-parishioners to vote in the elections before the act of 1814, which no person, examining the law of the case dispassionately, could for a moment do, it would have no tendency to invalidate the act of 1814 as to non-parishioners, or to show the existence of any such rights as are now claimed. The act of 1814 was merely defining the mode of exercising the electoral franchise in this corporation, and establishing certain safeguards against its abuse; like that of requiring the names of voters to be registered, or to have resided for a definite term within the parish, or to have been parishioners for a definite term, or to have been pew-holders; and which in no sense divested any *right*, but only defined the *remedy*. And if it might be said in some sense to have rendered the remedy more difficult to those who had broken off parish relations, and less efficacious, as it did not substantially remove all remedy (but

left the means of redress upon conditions easy of performance by all, and which are in themselves reasonable, fitting, and necessary, and not unusual in such cases), it came within the acknowledged discretion of the legislature. For every Episcopalian in New York may still qualify himself at slight inconvenience to vote at the elections in Trinity Church.

The law in regard to what change of remedy may be said to impair the obligation of contracts is well stated by *Johnson, J.*:²⁸ "It is not enough that the remedy is changed, and rendered less speedy and convenient. If there is still a substantial remedy left to enable the party to enforce his rights, that is sufficient." But we need not dwell upon this view of the case, as we do not regard it as having any existence in fact. And we have thus far dwelt upon it to show that if the claim were founded in fact, it was not impaired or divested by the act of 1814.

III. But we must be allowed briefly, but distinctly, to dissent from the entire claim, that non-parishioners ever had the right to vote at the elections in this corporation.

1. I assume this not to have been the purpose of the charter, from its inherent unreasonableness, and its conflict with all precedent or practice in similar corporations. The idea of the community or body of electors in any corporation, political or private, being composed of those having no connection with the corporation, or its specific object or functions, involves a solecism too gross to be seriously entertained by courts of justice in their search after the probable purpose of the grant of a charter to such a corporation, when no such intimation is found in the charter itself.

2. I regard the contrary as established by an acquiescence of nearly a century since the establishment of the first Episcopal Church in the city of New York, independent of Trinity Church, in 1793. This is a prescription of such a character that it could not be disregarded by any judicial tribunal having any respect whatever either for its own character or for the judicial wisdom and experience of past ages.

And the fact that some men have been bold enough to deny the soundness of this construction of the charter of Trinity Church, detracts in no sense from the force of the prescription, as evidence of the law whereby the construction of the charter becomes irre-

²⁸ *James v. Stull*, 9 Barb. Supt. Ct. 482.

vocably fixed by the force of the prescription ; or of the fact that the construction was the true one, or it would not thus have been acquiesced in. For to interrupt a prescription, something more is requisite than the protest of one or two persons, as is the fact in this case, or, indeed, of any number of persons, as the case might be. To interrupt a prescription, measures should have been taken to arrest the exercise of the right claimed, and to enforce the counter claim, or the corporation must be shown to have acquiesced in such counter claim, nothing of which has ever been pretended in the case of Trinity Church.

The objections now or hitherto made to the justness of the practical construction of the charter of Trinity Church, no more tend to qualify the inherent rights of the corporation, based upon such long and uninterrupted exercise of such rights, than does the malignant doctrine of the Red Republicans, that all property is theft, tend to impeach or defeat the titles of families to their hereditary patrimony after the lapse of centuries of quiet enjoyment ; or than do the revilings of the maligners of Christianity tend to impeach its pretensions to miraculous power to regenerate and sanctify the Faithful. Mere clamor, however loud or long continued, is no such interruption of a prescription as to destroy or essentially weaken its force. I conclude therefore by saying, that in my judgment there is no property in the city of New York more effectually beyond the specific control of the legislature than that of Trinity Church. It is precisely the same, in its relation to the control of legislation, with any other property, whether owned by natural persons or corporations. The legislature has the same power over, and right to control, corporations, that it has in regard to natural persons. It may, in the case of either, affect essentially the status or relations of property, by general laws, but not by special edicts, which in nowise partake of the character of laws.²⁹

IV. If it could be maintained, which I think it could not, with any show of plausibility, that the State of New York, as successor to the former sovereignty, retains a visitatorial power over this corporation, this does not extend beyond the enforcement of the statutes, and the duties or responsibilities and trusts thereby imposed upon the corporation. It gives no power whatever to change

²⁹ This whole subject is discussed very much at length in *Thorpe v. Rut. & Bur. Railw.*, 27 Vt. 140, and *ante*, 2 Railw. § 231.

the foundation, or to interfere with the organization or franchise of the corporation.³⁰

In *Louisville v. The University*,³¹ it was expressly declared, as a corollary from the case of *Dartmouth College v. Woodward*, "That where trustees are incorporated to administer a charity, and the endowment is made by individuals (and we have seen that a public endowment has the same effect as a private one), the donors have no longer any interest in the property while the corporation exists, but only a reversionary interest in case of its extinction; and that the present rights of property are vested in the trustees, who under the charter represent the donors, as well as the objects, of the charity, and may vindicate against wrongful assault, both the property and the franchises of the corporation; while the donors, as such, have no present right in the matter, unless it be that of appealing to the courts to coerce a compliance with the charter." This seems to me to contain the very essence of the visitatorial power of the state over this corporation, if I could admit any such power, which I am certainly not prepared to do, and which it is not important to discuss here, as no question of that kind has ever been raised.

RAILWAY INVESTMENTS. — POWER TO MORTGAGE, AND MODE OF EXECUTION.

Knapp and Miller v. Rutland and Washington Railway.

- I. As between debtor and creditor these questions would be of entirely different consideration.
- II. But all *bona fide* creditors stand upon equal equity; and a prior right among creditors must rest upon some legal advantage, fairly gained.
- III. In this view the defects in the plaintiff's legal claim are numerous, and of a very marked character.

It professes to be a mortgage of the real estate and franchises of the corporation without any action of that body, but through the agency of the directors merely. This cannot be maintained in law.

1. Because the title resides in the corporation alone, and can be conveyed only by the corporate action, in conformity with its charter and by-laws, and the general laws of the state.
2. All corporate franchises, and especially those of railways, are strictly personal and inalienable.

³⁰ This is fully established by the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518; *Allen v. McKeen*, 1 Sumner, 276, and the other cases referred to.

³¹ 15 B. Monroe, 642, 681.

3. This is a question of capacity and power in the corporation to make the deed, and may be raised by any one having an interest in it.
 4. Such an act, being *ultra vires*, is not susceptible of confirmation by any subsequent acquiescence of the corporation, either express or implied, or by any general act of the legislature.
- IV. Creditors are only affected by the registry of a valid mortgage, or knowledge of its existence.
1. The fact of an entry in the books of the company, that the bonds were delivered at a time subsequent to the statute, is not proof of the fact, and if the fact were proved, it could not affect subsequent *bona fide* encumbrancers, since it does not appear upon the registry.
 2. An instrument deficient in the statute requirements not entitled to registry, and not, therefore, constructive notice.
- V. There was not only a defect of power in the corporation to execute the deed ; but there is an entire want of any proper *action* of the corporation.
1. It is not done in the name of the corporation, and does not therefore profess to be their act.
 2. There is no pretence of any action of the corporation, but only of the directors, which is as absolutely incompetent as if it were the act of a single stockholder or director.
 3. The expression "all the business of the company," does not enlarge the ordinary powers of directors. It is not the proper business of a corporation to assign all their franchises, or even all their property. That would be to *annihilate* and not to "*transact* their business."
 4. Directors of joint-stock companies have no such power, as has often been decided.
- VI. This attempt to convey the real estate of the corporation by a vote of the directors is in direct conflict with express provisions of the general statutes.
1. It has been expressly decided that the general provisions of the statute as to the *mode* of conveying real estate are exclusive.
 2. So also that the vote of the corporation is indispensable to create the power to do so.
- VII. The addition to the name of Merritt Clark, of "President;" and of the name of the corporation, is a mere *descriptio personæ*; and would not render the deed binding upon the corporation, even if Clark had authority to bind them.
- VIII. The effect of the seal of the corporation being attached to the first mortgage.
1. It is attached to the paper in such a place, at the very top, as not to indicate it was done as an act of execution.
 2. Sealing never held equivalent to signing.
 3. The proof shows that the seal was attached after the execution of the instrument.
 4. If it is regarded as any portion of the instrument, it will avoid it, as a material alteration.
- PART II. Notice in fact may be relied upon by the plaintiffs.
- Div. IX. There is no evidence of notice in fact, except by Miller and Baldwin. These cannot avail against the bondholders under the second mortgage.
1. These bonds are negotiable instruments, and pass an absolute title by delivery.
 2. The notice to Baldwin was not valid for any species of contract. It was more calculated to put him off inquiry than no notice at all.
 3. The fact that Miller had been trustee in a former mortgage, if a valid one, could be no notice to the *cestuis que trust* under the second mortgage, even if the securities were not negotiable. 1. He was a mere agent. 2. All the notice to him was acquired in a different transaction. 3. The fact that he retained

\$250,000 of the bonds *secured* by this mortgage for the benefit of the first bondholders, not *secured* at all, showed that *he* even was not attempting to gain any fraudulent advantage.

4. But notice to all the trustees will not aid the plaintiffs.
- X. The claim to have the contract reformed, and for specific performance and a foreclosure, is not maintainable.
 1. Because of the intervening rights of other *bona fide* encumbrancers.
 2. This will be to *supply* a power, instead of *aiding* a defective execution of one.
 3. The lapse of time and acquiescence of plaintiffs is an invincible obstacle to such a decree.
 4. There is no such notice in fact to the subsequent encumbrancers, or even to Miller and Baldwin, as to justify a court of equity in interfering in any way.
- XI. Some reliance is made upon the fact of having obtained the indorsement of good counsel.
 1. This cannot render an invalid instrument operative in law.
 2. The *omission* to obtain proper advice may operate against a party.
 3. The advice was rash if it was given.
 4. This may not fairly justify any inference of bad faith in the bondholders, but it shows very clearly that those who executed the mortgage were *not* solicitous to have it valid, provided it did not bind them personally.
- XII. The position of affairs called for despatch and some reserve.
 1. Because the stockholders had subscribed under an assurance that *no* mortgage would be given.
 2. The fact that the mention of any such mortgage has been studiously kept out of the written reports to the stockholders, shows reserve in fact.
 3. The fact that the officers volunteered to get up this first mortgage, for the benefit of the contractors merely, is reason enough for reserve as to stockholders.
 4. All the circumstances go to show that it was regarded as a temporary expedient by the officers of the company.
 - 5 and 6. If the officers of the company or the bondholders believed in the validity of this contract, it was attributable exclusively to their *studious* reserve in regard to seeking *thorough counsel*, which is scarcely less than gross negligence, if we can fairly believe that it occurred altogether in good faith.
- XIII. Under such a lame show of equity on the part of the plaintiffs, it would be going farther than any case has ever gone to postpone the claim of those who appear throughout the transaction, in all their connection with it, to have acted in the utmost good faith.

OPINION.

1. THE following opinion, although not adopted by the court, will be found, we think, to contain sound views, and such as are in consonance with sound principle and established precedent, and such as must ultimately prevail. The idea upon which the court proceeded,¹ in setting up a contract as a valid mortgage of the

¹ Miller v. R. & W. Railway Co., 36 Vt. 452. We have thought fit to add the statement of the case and the opinion of the court at length.

The Rutland and Washington Railroad Company, chartered in 1847, surveyed and located a railroad, and put it under contract for its entire completion, including land

road and its franchise, where it was not in form a mortgage, and not in the name of the corporation, is so utterly in defiance of all

damages. The contractors were to receive in payment shares of the capital stock at par for all but \$100,000, which was to be paid in money. They proceeded with the work, and when it became necessary to procure rails, the capital stock was found insufficient. Thereupon the directors voted to modify the contracts by issuing \$250,000 in bonds, to procure the necessary iron, to be secured by mortgage of the road and its franchises, which bonds the contractors were to receive instead of an equal amount of stock, it having been ascertained that the bonds would be received for the iron; and the purchase was negotiated by one of the directors. The bonds and mortgage were authorized by votes of the directors, and M. Clark, president of the company, was appointed their agent and attorney to execute the mortgage, and authorized to give any further assurance and contract that might be proper. In the first annual report of the directors, made in 1851, they referred to the fact that these bonds were issued pursuant to the recommendations of stockholders, and that the iron necessary had been purchased with them. This report was presented and read by the president, and accepted by the stockholders. They were again referred to in the report of the directors of 1852, also accepted by the stockholders. Subsequent to this, in 1852, the corporation issued \$550,000 of other bonds, and secured them by a mortgage of the road and the franchises and property belonging to it, \$250,000 of which were designed by the parties to the transaction to be used in retiring the first mortgage, and the remainder in paying the other indebtedness of the company. The first mortgage bondholders did not assent to this arrangement. Miller, one of the trustees of the first mortgage, was also one of the trustees of the second. Authority to make the exchange was given to the president by the directors, and afterwards by a vote of the stockholders at a meeting in 1853. In 1858, the railroad company leased their road to one Canfield for the yearly rent of \$70,700. Of this \$16,000 was made payable to the first mortgage bond or note-holders, for their annual interest. In 1855, the corporation made another mortgage, securing \$1,300,000 other bonds, intended to retire both the former issues, and also to pay any other indebtedness of the company. Those secured by the first mortgage declined this arrangement also. The first mortgage, made by Clark, in pursuance of the authority given by the directors in 1850, after reciting the votes, proceeded as follows:—

“Know ye, therefore, that I, Merritt Clark, as I am the president of said company, as well by the power and authority vested in me by the vote aforesaid as in consideration of the sum of two hundred and fifty thousand dollars, to the use of the said corporation, well and truly paid, the receipt whereof is hereby acknowledged, do by these presents give, grant, bargain, and sell unto the said trustees and their successors (to be by themselves nominated and appointed) the premises hereinabove and in said vote mentioned. To have and to hold the said granted and bargained premises to them the said trustees, their heirs, assigns, and successors for ever, to their own use.

“And I, the said Merritt Clark, do hereby covenant to and with the said trustees and their successors that I am duly authorized and empowered to sell and convey the said premises to the said trustees in manner and form aforesaid, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Miller and Knapp, trustees, their heirs, assigns, and successors, against the said corporation and all persons claiming from, by, through, or under me, the said Clark, but against no other persons.”

The deed was conditioned to become void on payment by the corporation of the

just principle or sound precedent, that to its maintenance it will become necessary to disregard and subvert most of the law before

principal and interest of the \$250,000 in bonds, and was signed and sealed by Clark in his own name simply. The acknowledgment was as follows :—

“Then personally appeared the above-named Merritt Clark, the president of the above-named Rutland and Washington Railroad Company, and acknowledged the above instrument to be his free act and deed and the free act and deed of the said corporation.”

A certificate was also appended, signed by Pierpoint and Williams, attorneys-at-law, and Ch. K. Williams, attorney-at-law, that the deed was drawn in proper form and duly executed.

Barrett, J. “Had the corporation legal competency to pledge its credit for the procurement of rails for its road, and to secure payment by a mortgage ?

“It is now to be regarded as settled beyond any proper ground of question that a corporation may contract debts necessary for the due performance of the objects of its creation, and may give valid security for their payment by the pledge of any property or interests in property that are subject to its disposal, by virtue of the implied power existing in it, and without any express provision of statute to that effect, provided it be not restricted by statute in this respect. The case of the Vermont & Canada Railw. v. Vermont Central Railw., Vt. Sup. Ct. Jan., 1861, referred to in the argument, does not fall within this proposition ; for in that case the transaction in question was a contract of leasing for the payment of a stipulated rent, and of security for the payment of the rent, a transaction not within the express or implied powers of the two corporations till made so by statute. In the present case, the end and purpose of the creation of the corporation was the making and operating of a railroad. It was necessary to such end and purpose that the company should have rails as well as a roadway. It was competent for it to contract for their purchase, and to provide by proper means for the payment therefor. If it had not the money, it was competent for it to obtain credit by the pledge of its disposable rights and interests in property.

“The rails were purchased in the due course of business, and the obligations, called bonds, of the company were made and delivered in payment, purporting to be secured by a mortgage of the road and its franchises. And this was done in pursuance of an agreement on the part of the company that the bonds should be so secured, and they were received upon the assurance, made by the representative agents of the company, that they were so secured, by an instrument designed to be executed in pursuance of a vote of the directors authorizing the issue of the bonds and securing them by mortgage, and authorizing the president, as agent of the company, to make such mortgage, accompanied with the opinion of eminent legal counsel that said instrument was valid as a mortgage of the corporation.

“It is satisfactorily established by the evidence that the directors, with the knowledge and concurrence of all the stockholders, designed that the mortgage should be given, and that Mr. Clark, the president of the company, designed, in executing his agency in that behalf, to make and execute a mortgage which should be the deed of the corporation. It is also established that the corporation had no money, and no means otherwise wherewith to pay for or secure the payment for the rails. The rails thus acquired were used by the corporation for the completion of its road.

“The intervention of the contracts for the completed construction of the road, including its rails, with the modification of them as shown by the proofs, does not vary the legal or equitable aspect of the case, upon the question of the security claimed to have been given by the corporation for the bonds first issued.

established upon the point. But we desire to acknowledge the great learning and ability with which so startling a proposition is maintained in the opinion of the court.

"In the transaction of negotiating for the rails and other like things, and providing for the payment, the corporation would act through the directors as matter of course, under the express terms of § 6 of the charter, that 'five directors shall form a board, who shall be competent to transact all the business of the company.' See *Bank of Middlebury v. R. & W. Railw.*, 30 Vt. 159.

"There is no question as to the legal formality with which the directors acted in the present case. If, however, it was to be held that for validity the acts of directors in this behalf must depend upon authority conferred by the corporation, we find ample ground for holding such authority to have been conferred, in the fact of the knowledge and concurrence of the stockholders in all that transpired, while the matter of issuing and securing the bonds was in progress, and in the repeated acts of ratification afterwards; especially in what occurred at the meetings of stockholders in 1851 and 1852, when the directors made their annual reports; as well as in what occurred in connection with and as part of the transaction of making the second mortgage, in the latter part of the year 1852, and the lease to Mr. Canfield in 1853, and the third mortgage in 1855; in all which the existence of the first mortgage and of the bonds secured by it was recognized, and in no way repudiated, by the corporation. The principle is undoubtedly sound, as stated in *Redfield on Railways*, § 235, pl. 11 (vol. 2, p. 513), that 'when the company receive benefit upon money borrowed, they cannot avoid liability upon the mortgage given to secure its payment by denying the authority of those who contracted the loan in their behalf;' and the pertinency of its application to the present point is obvious. *Noyes v. R. & B. Railw.*, 27 Vt. 110.

"In *Curtis v. Leavitt*, 15 N. Y. 47, the language of *Comstock, J.*, is to the same effect. 'When a person receives and appropriates the benefits of a transaction done in his name and by his assumed authority, there exists the highest evidence of his approval. . . . These rules are elementary, and are grounded on the simplest ideas of justice in the dealings between men. They are also as plainly applicable to corporate as to other transactions, where the dealing is within the powers of the corporations. In such a case, no possible reason can be presented why a corporate as well as a private person is not bound by the dealings of its agent which it has approved, and the benefits of which it has received and appropriated.' On page 49 he says, 'But corporations, like other principals, may act and be bound in any of the modes not opposed to the general rules of law applicable to such bodies. They may previously resolve, they may subsequently acquiesce, they may expressly ratify, they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and thus put it out of their power to dispute the validity.' *Brown, J.*, on pages 136-138, expresses the same views.

"It is understood, of course, that this could be applicable only in case of transactions such as the corporation could lawfully become a party to, and not to transactions in violation of corporate rights and duties, such as would be void, and could impose no liability.

"If it were doubtful whether the corporation had the right, by virtue of its inherent capacity, to issue the bonds and make provision for them by way of mortgage, we think the act passed Nov. 9, 1850, should be regarded as operative to confer the right, and as effective upon the transaction in question. Section 1 of that act is, 'Every railroad corporation within the state shall have power to issue notes or bonds for the purpose of building or furnishing their roads, or paying any debts contracted for building or

2. At the instance of those who represent, as trustees, the interests of the mortgagees and other creditors of the company, I

furnishing the same, bearing such a rate of interest not exceeding seven per cent, and secured in such a manner as they may deem expedient."

"It is true that the vote of the directors, authorizing and providing for the issuing of the bonds and the making of the mortgage, and the execution of the instrument by Mr. Clark as president and agent, were prior to the passage of the act. But we find from the evidence that the bonds were not issued so as to become operative and obligatory as contracts upon the corporation until the month of February next after. Of course the security did not become operative until the debt had existence. It was but a mere incident of the debt, and was of no force and effect till the delivery of the bonds.

"It must be assumed as beyond doubt that the transaction, by the authorized agents of the corporation, of delivering these bonds, thus secured, in payment for the rails and for their transportation, was regarded by the corporation to be warranted by lawful authority, either as existing inherently in the corporation, or as conferred upon it by the legislature; and if it was so, neither the corporation nor any one standing on rights subsequently derived from it, can impeach the validity of the transaction in this respect.

"The question then arises, is the instrument, executed by Mr. Clark in consequence of the votes of the directors, the deed of the corporation? As to this, we think the authorities firmly establish the negative. Though it was designed by him as such agent, as well as by the directors in voting the mortgage to be made, that it should be the deed of the corporation, and though that design is fully evinced by the face of the instrument itself, still it is affected by technical difficulties of form and mode, that prevent it from being, in point of law, the deed of the corporation. The authorities cited by the counsel for the defendants are uniform and conclusive upon this point, and are not met or countervailed by the books and authorities cited by the counsel for the orators. This being so, the recording of the instrument did not constitute constructive notice of its existence and contents.

"The next question is, can the orators stand in a court of equity, on the ground that the transaction, as it was, operates in their favor as an *equitable mortgage*, to the intents and purposes designed, but which failed of being accomplished by the instrument that was executed?

"As between the mortgagee and the corporation, and aside from any technical impediments, the ordinary sense of justice would at once prompt an affirmative answer. The corporation and its administrative agents designed to make a valid instrument of security on behalf of the corporation, and supposed that they had done so. They issued the bonds in payment for and obtained the rails upon that design and supposition. The rails were sold and delivered, and the bonds received in payment, upon the same supposition, and with what seemed a most reliable assurance that it was verily true and well founded. The rails were used by the corporation in the completion of its road, thus at the same time affording a most indispensable element in its construction, and adding so much to the value of its property, and for use in carrying into effect the end and purpose of its existence.

"Assuming, then, that the corporation had power to issue bonds and to secure them by a mortgage, and that the directors were the proper agents of the corporation in this behalf, and that their acts to this intent were properly authorized, how are these acts, including what was done by Mr. Clark, to be regarded in connection with the fact, that the corporation has received and used the rails, as giving the orator an equitable right to the designed security?

have prepared the following opinion, as the best response I could give to their request for "my impartial opinion upon the questions in dispute, whether that opinion shall be for or against us."

"It seems to us the contract was one which the *corporation* were bound by, that is, the bonds are obligatory as a debt against the corporation, and that the contract as to the security is equally obligatory, unless some technical difficulty intervenes.

"Wherefore it is insisted that the statute of frauds has not been answered by what was done. Waiving any discussion as to what was the effect of the delivery and receipt and use of the rails, and the delivery of the bonds in payment, under a contract that they are to be secured by mortgage, we regard the action of the directors, by their formal and recorded votes, as tantamount to a memorandum in writing sufficient to answer the requirements of the statute. It constitutes evidence of the highest character, as against the corporation, of the agreement to give the designed security. We also regard the deed itself that was executed by Clark, taken in the light of the recitals, as also evidence of the highest character as to the contract to give such security. It is true that by the strict rules of law, this instrument is not to be regarded as the deed of the corporation. If it were to be so regarded, the orators would stand upon a technical and valid mortgage at law. But that it is not so, is because it lacks efficacy to convey the real estate, not by reason of any want of any power in the corporation, nor for want of any authority in Clark, nor for want of any intention on the part of the corporation or of Clark to make an instrument that should convey the legal estate, but because Clark mistook the proper technical formalities and mode of making such an instrument. We do not fully understand the ground or purpose of the remark that 'the private intention of Clark to make a mortgage against the company is of no avail, if it cannot be carried out by the rules of law.' If it be meant that the mortgage failing as to its technical sufficiency, to constitute a mortgage at law against the company is of no avail for any purpose, we think it unfounded in principle and unsustained by authority. If it be meant that the act of Clark, merely in pursuance of his private intention, would not affect the company, we assent to it; but this does not meet the point, for it appears on the face of the instrument, together with the votes of the directors, that he was authorized to make a mortgage that should technically convey the estate; that his agency in that behalf was for that very purpose, and that in what he did his design was to effect the purpose of his agency. We think this intent is 'so manifested as to give it legal validity,' in the language of the brief; not as a technical mortgage, operative to convey the legal estate, but as evidence as to the contract in writing, that at the same time satisfies the requirements of the statute of frauds and furnishes ground for asserting an equitable right in and to the security contracted to be given. The case differs widely from that cited from Ambler, 495, to show that Clark's agency was ministerial and must be strictly pursued, and unless he in fact made a mortgage valid in every legal requirement, what he did is of no effect, even as evidence, to affect the equitable rights and duties of the parties. In that case, the agent was empowered to sell at auction, but in fact sold at private sale, thus departing entirely from the scope of his agency. In this case, Clark was authorized to make a mortgage, valid at law to convey the legal estate. Acting within the scope of his agency, he came short of doing so, by reason of mistake as to certain technical requisites. Though he thus came short of accomplishing the purposes of his agency, it would require a new rule, both at law and in equity, to hold as nugatory, to every intent, what he thus did, even as evidence.

"In what is thus said, it is evident that the case of *Parish v. Coons*, 1 Pars. Eq. 89, furnished to the court in manuscript, is not applicable to the present, on the point

In doing this I have endeavored to possess myself of all the facts in the case, and the points of argument, and the authorities

of the authorization of the agent to make, on behalf of his principal, such a note or memorandum in writing as is required by the statute of frauds. In that case, there was a mere parol authorization, and it was held to be invalid under the statute of frauds. In connection with these remarks, it is appropriate to observe that the court do not adopt the views of counsel in another point; viz., 'that this being the sole, private act of Clark, cannot be controlled by parol in equity any more than at law, unless upon the ground of fraud or mistake.' We think that the contract was that of the corporation, but the instrument was so drawn and executed as technically not to make it legally operative as a specific mortgage of the corporation. This was owing, not to any mistake on the part of the corporation as to matter of law, for they intended and fully authorized Clark to make a valid mortgage, but wholly owing to a mistake on the part of the agent of the company as to the mode of adequately executing his agency. The corporation intended he should make an instrument that should be technically their deed. He, by mistake, made one that technically could operate only as his deed. The corporation, as such, did not pass judgment upon the legal quality of the instrument. The agent, under the authority conferred, executed, and delivered it. This we regard, not as a mistake in matter of law by the corporation as to the meaning and operation of the instrument that was executed and delivered, but as a failure on the part of the agent adequately to perform the office and purpose for which he was appointed. Hence we have no occasion to discuss the question whether, for mistake in matter of law, a court of equity will grant relief. In this connection it is further to be remarked, in view of what has been already said, that this is not, in our apprehension, a case in which 'the court is called on to reform a written instrument on the ground of mistake, by parol evidence merely, and thus in effect to repeal the statute.' As before said, we think the face of the instrument shows clearly itself that it was designed to be the deed of the corporation; and all the recorded proceedings of the directors in this behalf, in pursuance of and to carry out which this instrument was made, show clearly the same thing. The instrument and these recorded proceedings constitute reliable *criteria* whereby to determine in what respects, and to what intent, the instrument should be reformed, if such reformation is necessary as a means of enabling the orators to secure their rights through the intervention of the court in this respect. It also gives point and application to ancillary parol evidence, in such a manner as to preclude the hazard of being misled by it.

"In pursuance and as the result of these views, it is clear, upon familiar and unquestioned principles, illustrated by very many adjudged cases, that as between the orators and the corporation the transaction, as found by the court, entitles the orators, in equity, to have the security which it was within the power of the corporation to give by virtue of the proposed mortgage, that it constituted an equitable mortgage to the same intents as a mortgage answering the technical requirements of the law.

"It is now to be considered how the rights of the orators stand in relation to the second and third mortgages.

"We assume for the present that subsequent grantees take and hold the estate conveyed, subject not only to all legal encumbrances to which it was subject in the hands of the grantor, but to all equitable encumbrances of which they have notice. A case in point, as propounding and applying the principle, is *Sumner v. Rhodes*, 14 Conn. 135.

"The court are convinced by the evidence that all the trustees under the second

relied upon, on both sides, as far as was in my power. And while I do not claim for my views any higher character of impartiality

and third mortgages, prior to and at the time such mortgages were executed and they became trustees, had notice and knowledge, in point of fact, that the first bonds had been issued, and that the same were secured by mortgage. All the circumstances and reasonable probabilities concur with the direct evidence, and leave no doubt of the fact. This being so, they stand chargeable with the legal consequences of the right, whether legal or equitable, which existed in virtue of the issuing of such bonds, with such security in the way of mortgage as appertained to them; and that, too, even though it were to be held that the validity of that security depended upon acts of the corporation prior to the making of said second and third mortgages, by way of recognizing and ratifying the act of the directors in the transaction constituting the creation of the security, and even though the trustees under the said mortgages had not in fact knowledge of these acts.

“When they had notice and knowledge of the issuing and existence of the bonds, and of their being secured by mortgage, if the fact existed, it had full operation and effect to subject the title which they took with such notice and knowledge of the fact to the legitimate consequences of the fact.

“The bonds, immediately upon being issued, having been received in payment for the rails, thereby became effective in the hands of the holders, with the full right vested in them for the security provided in that behalf; and it was not in the power of the corporation, or of any of its officers, without the concurrence of such holders, to divest or affect that right by any act of theirs thereafter; so that whatever was said or done by or in behalf of the corporation, through its officers, in respect to other bonds and mortgages as affecting the rights of the holders of the first bonds, or by way of making other provisions for the debt evidenced thereby, was entirely nugatory as against the holders of the said first bonds. They stood upon fixed and vested rights, over which the corporation had no control, except by paying said bonds. It makes no difference as to the rights of said bondholders what provision was made in this respect, either by means of or under the second or third mortgage, or whether the corporation or its officers acted in good faith or not in making and administering such provision.

“It is now to be considered how such notice and knowledge on the part of the trustees under the second and third mortgages affect the title they hold, in view of the relations they hold to the bondholders under said mortgages respectively.

“In *Pierce v. Emery*, 32 N. H. 484, 521, Ch. J. *Perley* says: ‘Notice to trustees who take a conveyance merely for the purpose of upholding an estate, without having any connection with the title, is not always, nor perhaps usually, regarded as notice to the *cestui que trust*. But the trustees under this act must be regarded in the light of agents for negotiating the loan; they act for those who lend their money on the security of the mortgage; they are charged with the duty of representing the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through the trustees, whom the law appoints to act for them. Notice to the trustees would be all that could be given in this case.’

“It is well settled, as is said in *Hill on Trustees*, p. 513: ‘Notice, either actual or constructive, will be equally binding, whether it is given directly to the party himself, or to his agent, solicitor, or counsel.’

“We think both upon principle and from a due regard to what alone is practicable in such a case, that notice to trustees should be held to affect the title in their hands with reference to all rights in respect thereto under the trust. Though it is obvious

than that of counsel desirous of learning and communicating the truth to my clients, for their guidance in the discharge of respon-

and readily conceded that bondholders acquire their rights, in reference to the security provided by the mortgage in trust, by the purchase of the bonds, and with such purchase the trustees have no connection, nor any agency in reference to the transfer thereof, yet it is at the same time true, that in reference to the security for holding, administering, and enforcing it, according to the provisions of the trust, the trustees are the agents of the parties interested and entitled by reason of being bondholders. We are unable to assent to the proposition that the trustees are only the agents of the *cestuis que trust* for the purpose of holding the legal title. They are agents for holding just such title as is created by the transaction, and for administering it according to the terms of the trust, and whatever title the *cestuis que trust* have, whether legal or equitable, is through and by reason of the title conveyed to and held by the trustees. Even if it should be granted that the trustees were agents for the purpose merely of holding the legal title, still, as the rights of the *cestuis que trust* depend upon and are to be asserted through that legal title, whatever affects such legal title in its creation in the trustees must affect the rights and interests that are dependent upon it. If the legal title is charged with an encumbrance in its creation in the hands of the trustees, it is difficult to see how the *cestuis que trust* can have an equity suspended from that legal title, that shall override such encumbrance. However that might be as a proposition applicable to a dry trust, still, as to a trust which, in addition to holding the title, is administrative of the property for the purpose of effectuating the security, the trustees must be regarded as the agents of the *cestuis que trust* with reference to all their rights and interests, both in the title held and in the administration and fruits of the trust, according to its terms and legal operation. In *Sturges & Douglas v. Knapp et als.*, 31 Vermont, 34, it was held, that a mortgage by a railroad company, where the only trust expressed was to hold the property to secure the payment of the bonds named, created an active administrative trust, even after a foreclosure, under which the trustees were authorized to make a lease of the road and property for ten years, against the protest and remonstrance of a large majority in amount of the bondholders, though contrary to my own opinion. But it is the adjudicated law on the subject in this state. In the present case, however, the second and third mortgages provide specifically and in detail for the administration of the property after the conditions shall have been broken, for the satisfaction of the rights and interests of the bondholders under the mortgages. The fact that the bonds are negotiable, and pass from hand to hand like bank-bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage. Such bonds purport to be secured by a mortgage in trust to trustees who are designated and known. They are negotiated and purchased on the credit of the security thus existing. That security consists in the title and property which exist in the trustees. By the purchase of the bonds the purchaser voluntarily adopts the security as it exists in the trustees, and becomes *cestui que trust* under them, thereby adopting said trustees as his agents for holding the existing title and administering the property held thereby to the intents specified in the creation of the trust. The question is not as to how *cestuis que trust* would be affected by notice to trustees of transactions which occurred subsequent to the creation of the trust, or to their becoming *cestuis* under the trust, but as to how they are affected by notice to the trustees, which, as to them personally, affects the legal estate in their hands at the time, and in the act of their becoming trustees.

“Then as to the practicableness of the contrary doctrine: The very fact that the

sible fiduciary obligations, I feel that such a position presents the very highest motives for research, watchfulness, and circumspec-

bonds pass from hand to hand, and without any record or notice, and are changing hands every day to a greater or less extent, shows that the matter of fixing an equity by notice would be practically impossible. It cannot be known in whose hands all or any considerable portion of the bonds are, nor in whose hands they will be the next day or the next month. Of course, the notice would affect only the party to whom it was given, as there is no joint interest or representative relation between the different holders of bonds. Nor would notice to a holder of specific bonds to-day affect a person who, without notice, should in good faith become the owner of the same bonds to-morrow. The result must necessarily be that, however well-grounded an equity a party might have against the corporation, and against the trustees personally, attaching upon the title held by the trustees, it would prove barren and futile to any beneficial intent, by reason of the impossibility of knowing and notifying the ever-shifting parties who have an interest and claim an equity subsequently created and subsequently accruing. On the other hand, it would be easy, comparatively, for persons desirous of investing in railroad mortgage bonds to apply to the trustees holding the security, and elicit the state of the title. We think it no hardship that they should be required to do so, if they would avoid the hazard of finding their security subject to a prior encumbrance, when it might be too late to save themselves from the consequences of such a state of the title.

"The only case that has been cited, or that we have been able to find, is *Curtis v. Leavitt*, 15 N. Y. 9. Several of the judges drew up opinions. *Shankland* and *Paige* concurred with *Comstock* and three other of the judges in the result that the bondholders were entitled to the security in the hands of the trustees, those two putting it upon the ground that they were *bona fide* purchasers of the bonds, without notice of the defect in the manner in which said securities had been assigned to said trustees, one of whom knew of such defect; holding that the trustees were not agents of the bondholders, but only of the corporation making the assignment. The four other judges held the assignment itself to be valid, notwithstanding such alleged defect in the manner of making it, on the ground that it being within the scope of the power of the corporation to make such an assignment, and the corporation having received the benefits resulting from the issue and sale of the bonds, it had by its acts of recognition and ratification cured said defect.

"Judges *Shankland*, and *Paige* cite no authority upon the point to sustain their view; and it was not one of the points decided in the case. The securities assigned were bonds and mortgages, to be held by the assignees, and the avails thereof to be held and applied as security and in payment of the bonds issued by the company in the manner provided in the instrument of assignment. We have no occasion to present any critical analysis and discussion of that case for the purpose of ascertaining whether the trustees and bondholders in that case sustained such a relation to each other and to the subject-matter of their respective interests as to constitute ground for the application of the same principle and rule as the case before us. For if it did, upon the views here expressed, we should regard the point held by Judges *Shankland* and *Paige* as unsound. But it is sufficient to say that it was not so decided in that case, and of course stands only as the individual views of the judges named.

"It is to be noticed that in what we have said as to the trustees being agents of the bondholders, we confined that agency to the purposes of the trust with which the trustees were clothed; namely, that of holding the title as security, and enforcing and administering such security according to the provisions of the trust, both express

tion, that the opinions I form and express may be found warranted by the facts of the case and the established rules of law applicable

and by law implied. We do not hold, nor do we assent to the position taken in the argument by one of the counsel for the defendants, in reference to the \$250,000 of bonds under the second mortgage, put into the hands of Miller with the design of having them appropriated in exchange for the first bonds, that the trustees have, under the trust, any agency to discharge, change, or compromise any security which they hold as such trustees. They are not general agents of the bondholders, but special, and limited to the legitimate purposes of the relation which they hold to the security and to the parties interested, under the trusts with which they are clothed. Any act or omission of theirs, therefore, whether in good or bad faith, outside the scope and purposes and incidents of the objects of the trusts, would not affect the interests of other parties under the trust, on the score of the agency existing in that relation.

"But it is insisted that the subsequent mortgagees cannot be subjected to the prior equitable encumbrance, unless the notice to them was such as to make it fraudulent in them to take and register said mortgages in prejudice to the known rights of the other parties. To the principle embodied in this position we have no difficulty in assenting; but we think that the impression naturally resulting from the manner in which it is put may not be precisely accurate. The notice which the law regards as sufficient to charge a subsequent purchaser is such as, if duly heeded and faithfully pursued, would lead to a knowledge in point of fact of the true character of the prior encumbrance, and thus charges him with the legal consequences of such prior encumbrance, however he may judge of the validity in point of law of such encumbrance, or of the legal consequences that may flow from it. By the fact of such notice being charged with the knowledge of such encumbrance, if it, in fact, existed, the law regards the taking of a subsequent conveyance, in prejudice to such encumbrance, as being in bad faith on the part of the purchaser, even though in truth he took the conveyance either in heedless disregard of such notice, or upon the supposition that the prior claim was invalid, or in doubt whether it was valid or not, and thought best to take his chances in that respect, and not with any wish or intent to defraud anybody. Indeed, the true idea of fraud, as involved in this subject, is not so much that there is fraudulent intent on the part of the subsequent purchaser in taking the conveyance, as that to permit it to be set up and enforced, as against the prior equitable title, would operate a fraud as against that title. This is the elemental idea of an estoppel *in pais* in its ordinary application, to which the principle upon which a subsequent purchaser is charged by a notice of a prior equitable title is strikingly analogous, if not precisely identical, with it.

"The next question is, had the corporation any right in the subject-matter of the mortgage, upon which the mortgage could lawfully be operative? It purports to convey the 'road and its franchises, the location, description, and survey of which has been duly made, &c.' It is not questioned, and is so conceded in the argument, that the right and interest of the corporation is so in the nature of real estate, or is such an interest in land, as might be the subject of conveyance by mortgage; but it is insisted that the corporation holds that right and interest so under and in the nature of a franchise for the public, as to be disentitled to make any conveyance of it. Much was said in the arguments, and much is contained in the books, as to the incompetency of a corporation to make any conveyance or transfer of its franchises unless specially authorized to do so by act of the legislature. It is claimed and insisted that the franchise is conferred upon a particular body of men, constituting the corporation, imply-

to the same. The case is unquestionably important, both in its principles, and in the amount in controversy, and somewhat com-

ing a special confidence in them to answer the trusts in behalf of the public which constitute the consideration for the franchises, and that it is not competent for the corporation to disable itself from holding and fulfilling those trusts, either by disposing of its franchises or of the means necessary for the execution of such trusts. In order to make a practical test of the soundness and value of this proposition, it seems worth the while to consider the subject with reference to its actual elements.

"The end and object on the part of the public is primarily the same as that on the part of the corporation, namely, the construction and operation of a railroad, the results of which, as the next and most important consideration, are, on the one hand, serving the public interests and convenience, and on the other, the pecuniary emolument of the corporation. The former is the consideration upon which the corporation is created and its franchises conferred by the legislature; the latter is the inducement which leads individuals to become members of the corporation. It is necessarily implied as being in contemplation that the end of making and operating the road is to be attained through the use of such practicable means as are ordinarily resorted to in such enterprises. These are, first, money raised on subscriptions to the capital stock; second, money and materials raised on such credit as can be made available. If neither of these means prove effectual there is an end of the enterprise, both with reference to the public and the corporation. The present case is a clear illustration. The road was located and surveyed, and was in the process of being built, by means obtained through subscriptions to the capital stock. It was necessary to have rails. The capital stock could not be made productive of the means of purchasing them. The only resource left was such credit as could be obtained. The only means of obtaining such credit was by the pledge of such proprietary rights and interests as the corporation had, and they consisted only of the road and franchises. If these means could not be made available the enterprise was doomed to stop at a stage when neither the public could derive any benefit from it, nor anybody else, and when all that had been done would be outright loss and sacrifice to everybody but the laborers who had got their pay. In this condition of affairs, did public policy, did the trust for the public benefit, reposed in the corporation as the consideration for creating it and clothing it with its franchises, require that the corporation should then come to an end, and its charter become forfeited?

"On the other hand, looking to the purpose to be served the public, viz., the serving of the public interest by the making and operating of a railroad, would not public policy, and the character of the trust reposed in the corporation in behalf of the public, rather require that the corporation should pledge such means as it had for a credit that would enable it to go forward with the enterprise to a successful result, in the reasonable and confident expectation of being able to redeem the pledge, and realize to the public and itself all the legitimate benefits of the undertaking? On the subject of public policy the legislation of 1850, of 1856, and of 1857 is quite significant. The act of 1850, authorizing railway corporations to issue bonds secured in such manner as they may deem expedient, has already been recited. In 1856 it was enacted,— 'Section 1. All mortgages of railroad franchises, furniture, cars, engines, and rolling-stock, when properly executed and recorded, shall be effectual to vest in the mortgagee a valid mortgage interest in and lien upon all such property without delivery or change of possession, and, for the purposes of mortgage, all such property shall be deemed part of the realty.' This is decisive that the legislature regarded it as competent and proper for railway corporations to mortgage franchises as well as tangible

plicated in its details, and I have devoted my time and energies to its full and faithful comprehension. But however important and

property. It is not creating a new power in corporations, but only providing for the effectuation of a power assumed as already existing, and is clearly to be taken as additional to and in furtherance of the act of Nov. 9, 1850, to relieve the necessity of a change of possession, which under the common law of the state would be necessary in order to render security on chattels given under the act of 1850 effectual against sales and attachments. In 1857 it was enacted, — 'Section 1. In all cases where a mortgage of any railroad, or any part thereof, made by any railroad company in this state to secure the payment of bonds shall have been foreclosed, and the legal title to the premises vested in the mortgagees, any number of persons holding a majority in amount of the principal of the bonds so secured may form themselves into a corporation for the purpose of owning or maintaining and operating such railroad,' &c., providing in detail for the organization. Section 7 provides, in case of the failure of the bondholders to form a new corporation, as before provided in case of foreclosure, or if the railroad on which the mortgage exists shall be sold or assigned by virtue of any order, decree, or judgment of any court, the purchaser or purchasers, grantee or grantees, shall have, take, or possess all the rights, powers, and privileges before granted to a majority of the bondholders, and may become a corporation in the manner prescribed, and have all the powers, franchises, and privileges, and be subject to all the duties granted to, or imposed upon railroad corporations by law. These enactments, all of which are embodied in the General Statutes, page 237, leave no doubt as to public policy as bearing upon the subject now in hand.

"But it is said, if the corporation is permitted to convey away its franchises and its property essential to their exercise, it will disable itself from performing its obligations to the public. It might seem to be an answer in point, that unless it is permitted to do so, it will never have the ability to discharge those obligations. But let us inquire a little into the legal and practical character of those obligations.

"It is assumed by the court, that, if a corporation would entitle itself to the enjoyment of its franchises, it must comply with the conditions and requirements of its charter, both express and implied, so far as its duties to the public are concerned. It must act under its charter for the accomplishment of the purposes designed by it. But it is at the option of the corporation whether it will do so or not. The only remedy in behalf of the public is by a proceeding to enforce the forfeiture of the charter of the corporation. The corporation cannot be compelled either to make or to operate a railroad. Whether it will do so or not depends upon the expectation of its being a feasible and prosperous enterprise. If it should find or expect it to be a profitable one, it would be likely to continue its prosecution. If the corporation should, for prudential considerations, see fit to transfer to others its property, with the franchises appertaining to such property, the same motives would operate upon the assignees, and to the same intent as upon the corporation. The assignees would hold, subject to the duties and obligations to the public which rested upon the corporation, and in order to take any benefit from the assignment would find it necessary to answer to those obligations and duties. The same remedy would be effectual, as far as rights depending upon the franchises of the corporation were concerned, upon the assignees as upon the corporation. The assignees could no more convert the roadway to other uses than could the corporation. They could no more turn to any other account than the operating of a railroad any of the corporate rights and duties, than could the corporation. So far as property held in absolute title was concerned, the corporation and the assignees could equally dispose of it as they should see fit,

complicated the case may be, in its facts and in the rules of law applicable to them, I must say that I have not been able to con-

whether such property was essential to the operating of the railroad or not. So long as the rights and privileges conferred upon the corporation should be exercised in accomplishment of the purposes for which they were conferred, there would seem to be not only no occasion, but no right, on the part of the public to interpose between the corporation and the assignees, — certainly not by taking a forfeiture of the charter; and, as it seems to us, equally none on the part of individuals, by way of questioning the assignment on the score of public policy.

The idea of a particular confidence reposed in the particular persons who compose the corporation, for the service of the public interests involved in the making and operating of the proposed railroad, seems to us altogether fanciful and theoretical. In fact there is no such confidence. From the nature of the case there could not be. For who shall compose the corporation at any particular time depends on who own shares of the capital stock, — one set of men to-day, another to-morrow, some citizens of the state, some foreigners. The true idea is, that the public relies for its assurance that its rights will be duly answered upon the fact that they must be, in order that the conferred privileges may be held and enjoyed by the corporation, of whomsoever composed, not upon any personal confidence which the legislature has in an indiscriminate body of persons, — men, women, and children, — citizens and foreigners, daily changing, who may become or may cease to be stockholders at their own pleasure, without restraint.

“Now to recur to the mortgage. What does it purport to convey? The premises mentioned in the following vote: ‘Resolved, that Mr. Clark, the president of this company, be appointed their attorney and agent, to execute a mortgage of their road and its franchise to Daniel S. Miller and Shepherd Knapp, &c.’; that is, such title as the corporation had, and the privilege appertaining thereto, viz., the right to the roadway, for the purpose of making and operating a railroad, as provided by the charter, with the privilege of making and operating it, and enjoying the emoluments thereof.

“We think, upon the views thus presented, as well as in conformity to several cases adjudged by courts of the highest character, as also to the opinions of eminent juridical writers, that it should be held that the corporation was competent to convey in mortgage what this mortgage purports to cover and convey; viz., the road and its franchise, as now construed. See Redfield on Railways, § 235 (vol. 2, pp. 510–552), and cases cited in notes; see particularly note 22, and the case of *Hall et als. v. Sullivan Railw.* (p. 522), in which we think the authority of a corporation to mortgage its franchise to build, own, and mortgage a railroad, and to take tolls thereon, is put on satisfactory grounds. See also the opinion of *Davis, J.*, in *Morrill v. Noyes*, recently decided in the Supreme Court of Maine, 3 Am. Law Reg. n. s. 18. It is to be noticed that the language of this mortgage, in describing the subject on which it was to operate, does not bring in question the much vexed subject of the power of a corporation to transfer its franchise of existence. It purports to convey only the road and its franchise; which terms embrace only such rights and privileges as are involved in the owning, maintaining, and operating of the said railroad, and in the receipt and enjoyment of the income and emoluments of so doing. The franchise conveyed is by the language restricted to the franchise that the corporation had in the road itself, and therefore cannot be regarded as touching other franchises not named, such as the right of being a corporation with perpetual succession, of suing and being sued under its corporate name, &c. The language of *Bennett, J.*, in *Bank of Middlebury v. Edgerton et als.*, 30 Vt. 182, 190, we adopt in word and principle, as expressing the

vince myself that there is really any doubt how it ought to be determined. The best attention I have been able to give it has

true idea upon this subject as involved in the present case. He says: 'It is not necessary in this case that we should hold that the franchise to this company, to be a corporation, is a subject of sale or transfer. The right to build, own, manage, or run a railroad, and take tolls therefor, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable,' citing *Peter v. Kendall*, 6 B. & C. 703; *Comyns's Digest*, Grant, C.

"It is now to be considered what constitutes the road within the meaning and operation of the mortgage. This is mainly matter of construction, in the light of the condition, character, and circumstances of the subject-matter. At the time the transaction took place, a railroad had been located between the two *termini* and put under contract, and was in the process of construction, but was in no part completed as a railroad ready for use. It could not be that the mortgage was intended to be confined in its operation to the road in the condition in which it then was. Indeed, the very purpose of the mortgage was to enable the corporation to obtain an article of construction necessary to its completion as a railroad. It is too plain to require discussion that it was the intention of the parties that the mortgage should take effect upon the road in its completed condition, proper and ready for use in running over it in the ordinary manner in that kind of business. And such is the legitimate force and import of the term as used. It was not a *road*; viz., a railroad, in the condition it was in at the time of making the mortgage. It was a mere roadway, in the process of being wrought out into a railroad. The mortgage is not of a roadway, or a right of roadway, or of a roadway in process of being wrought into a roadway, but of 'their road.' It also seems plain that the mortgage was designed to take effect upon the railroad, as it should exist under the rights of the corporation, at the time the mortgagees should succeed to the rights of the corporation, by virtue of the due enforcement of the mortgage. It may be taken as granted that, in fact, the location of the road was changed in different points from the place fixed upon in the original location, after the mortgage took effect, and that it has been located and constructed beyond one terminus of its location and survey, as it was at that time. Still, if it is the railroad of the corporation under its charter, the whole becomes, in our apprehension, subject to the mortgage. No other view is practicable without impeaching both parties of a very imperfect comprehension of the subject they were dealing with. The value of the security depended entirely on its capability of being used as a railroad. Only by reason of its being so used would either the corporation or the mortgagees hold any rights in reference to it; for an abandonment of this use would subject such rights to a forfeiture, and the land covered by the road to a reverter to the owners of the fee. This fact seems conclusive as to what was the intention of the parties, so far as the change of location is concerned; for to the territory covered by the abandoned location, the corporation and their assignees lost all rights by the fact of abandonment. So, too, in respect to the addition at one end of the road, the same rule applies. The idea that two miles, more or less, of a railroad, continuous between two fixed points, constructed in the same right, and to be used in the same right, and as part of the same road, were to be severed and held by the corporation, as against the operation and effect of the mortgage, if it exists at all, must have had its origin at a period much more recent than the mortgage now in question.

"Such being regarded as the true construction of the mortgage in the meaning of the terms and the intent of the parties, it should be allowed to have effect accord-

convinced me that there is really no doubt in regard to the questions of law presented in the following opinion. And as those

ingly, unless prevented by the intervention of some legitimate obstacle. And in this respect it is asserted that the corporation had not acquired the right of way to a considerable part of the road at the time the mortgage took effect, for the reason that it had not paid the land damages to the respective owners. It seems a sufficient answer to this that any defect of title, as between the mortgagor and the mortgagee, to the subject conveyed by the mortgage, is a matter for them alone to take care of; and least of all could it properly be asserted against a claim to foreclose a mortgage, either by the mortgagor, or by those standing upon rights under him as subsequent mortgagees. If the land-owners have not got their pay, it is for them alone to look after their rights in this behalf. If anybody has paid any of them at the request of the corporation, they can assert their claim to reimbursement of the party at whose request they did it, in such time and in such way as they should be advised. If somebody has volunteered to make such payments, it will be seasonable to determine as to their rights and remedies when a proper case shall be presented for adjudication. The rights and claims of parties in respect to the roadway, that may affect the security in the hands of the mortgagees, we think cannot properly be brought into question, much less adjudicated, on this proceeding to enforce the security against parties that are subjected to it. And this view relieves us from considering and discussing the effect of the consent, shown to have been given by the land-owners, to the making of the road without an appraisal and payment of the damages as a condition precedent.

"In the view we have thus taken of the construction of the mortgage, there seems to be no need of considering the mooted question, as to the operation of a mortgage upon subsequently acquired property as accessory to the principal and present subject-matter of the mortgage. The road then in the process of construction, with the rights and privileges of the corporation in it as a road completed, was the thing mortgaged. The accessions to it by way of completing it are not to be regarded as subsequently acquired property in the sense of the cases in which the subject has been discussed, distinct and separable from the principal thing, leaving that entire and complete, and being in themselves entire and complete, but are to be regarded as constituting an incorporated and inseparable part of one entire thing; viz., the road. Such being the construction of the mortgage as to the meaning and intent of the parties, the operation we give to it is amply countenanced by the case of *Willink v. Morris Canal and Banking Co.*, 3 Green. Ch. 377; by *Redfield on Railways*, § 235 (vol. 2, pp. 533-550), and notes 25, 28, 31, 33; and by an article by the same author in 2 Am. Law Reg. n. s. 527, 528, 529, in which it is said: 'The assignment of future acquisitions will not become operative at law. But in equity it is settled by a long series of decisions that such an assignment is perfectly valid and effectual if made upon a valid consideration;' citing several cases in England, and giving the substance of *Halroyd v. Marshall*, recently decided in the English House of Lords, and reported in 9 Jurist, n. s. 213, and closing with the following remarks: 'This decision, resting as it does upon unquestionable grounds of principle and authority, cannot fail to have a most important bearing upon similar questions in this country, which have always been numerous in this country, both in regard to railways and to the equipments of railways, and some of which have been already determined by the courts in favor of the equitable rights of the mortgagees, without seeming to comprehend very fully the equitable grounds on which they may be made to stand. See also *Hart v. F. & M. Bank*, 33 Vermont, 252; *Coe v. Pennock*, 23 How. (U. S.) 117, where Mr. Justice *Nelson* and the counsel in argument go into an examination and discussion of this

were decisive of the case, I have omitted all allusion to others of a more questionable character; and also to all mere formal defects

question in all its bearings, and the learned judge arrives at the same just conclusion substantially with that already intimated as having been reached by the House of Lords.' See also *Morrill v. Noyes*, *supra*. It is to be understood that in making these references and quotations, nothing is to be regarded as adopted and decided in this case beyond what is embraced and implied in this mortgage, giving the effect we do to its terms in their application to the subject-matter. And here it is proper to say that we do not regard the mortgage in question, either by its terms or by any fair implication, to embrace any articles of property by way of completing and furnishing the road, not entering into and constituting a part of the structure of the road, nor being erections upon land. This would therefore exclude from its operation what is called rolling-stock, and other personal chattels that go to make up the usual and necessary furnishing and equipment of the road, but not so affixed to the land as to acquire the character of the realty. The mortgage does not embrace any other subject of conveyance but 'the road and its franchises,' differing in this respect from the mortgages or other conveyances in all the cases referred to, where they have been held operative to convey personal property subsequently acquired.

"To the suggestion that the mortgagees can only obtain the fruits of this mortgage in virtue of the continued existence and organization of the corporation, and the corporation having parted with rights that are indispensable to its fulfilling the ends for which it was created would be no longer entitled to continue, and so the ends for which it was created would be defeated, — it seems sufficient to say, that whether its potential organization and continuance would continue or not, would depend on whether it should have subjected itself to the forfeiture of its charter, by the failure to answer the purposes for which it was created, in the matter of its duties to the public. So long as those duties should be performed, would not the claim of the public, as well as of individuals, be fully answered? And is it to be presumed in anticipation that the assignees will fail to perform those duties as fully as the corporation itself would have done, when the same motives exist and would be operative upon the assignees and upon the corporation, and when the same remedies may be made available, both in favor of the public and of individuals, for a failure to operate the road; viz., as to the public, a forfeiture of the rights granted under the charter, and in favor of individuals a reverter of the lands constituting the roadway? As to the going out of the corporation by abandoning or ceasing to keep up its organization under the charter, it will be in season to consider that subject, and determine the rights and remedies of the parties interested, when an occasion shall have presented itself, having in mind in the mean time the statutory provisions of 1857, still in force, for proceedings of trustees and bondholders after foreclosure. G. S. 238, and following.

"We proceed now to consider the point made by the defendants, 'that if the orators have no legal estate vested in them by this pretended mortgage, they have no standing in court whereby they can maintain this bill.' To serve this proposition, it is asserted that they can only be made trustees of the bondholders by force of having the legal estate vested in them. No case or book is cited to sustain these positions, and we do not perceive upon what principle they can be maintained. The proposed security for the bonds was to be made by a conveyance to trustees, to hold the title, and to make the security available by such measures as the law might warrant in case it should become necessary to enforce it. Whatever right or interest might appertain to the bondholders in or to the security, was the equitable one of *cestuis que*

in the bill, many of which, I have no doubt, must be regarded as fatal to the remedy now sought; and some of the questions made

trust under, and by virtue of, the title conveyed to and vested in the trustees. Whether that title was legal or equitable, the intervention of trustees was the means by which its beneficial purposes were to be made available to the bondholders. In view of the purposes designed to be effectuated by the transaction of the attempted security of the bonds, the trustees became charged with the duty of asserting and enforcing such title as was vested in them, as a necessary means of effectuating such purposes. It would present a case of striking singularity if it should be held, that because the mortgage was equitable and not legal, that therefore the trustees to whom it was made were not entitled to enforce it in the character it possessed in contemplation of law, and for the ends for which it was created. In saying that 'one object of the bill is to make them trustees by reforming the instrument, and until that is done they have nothing to stand on, and of course at the institution of the suit they were without rights,' it would seem to be begging the whole question. The bill is brought to enforce and foreclose what is claimed to be an existing, enforceable, and foreclosable mortgage. It sets forth all the facts upon which the claim is based. Among other things, it sets forth the doubt whether the instrument as executed would be held for all technical purposes a legal mortgage as the deed of the corporation, and asserts that the orators 'are entitled to a decree that the same be by the railroad company formally and solemnly executed, so that it shall at law, and against all the defendants, be deemed to all intents and purposes a mortgage, and as such, a binding first mortgage and conveyance upon and of the road, property, and franchise.' But no prayer is framed upon that averment, nor is it claimed in the closing argument of the orators' counsel as a ground of relief. The bill claims a foreclosure on the ground that the whole transaction constitutes an equitable mortgage to the same intents in a court of equity, and for the purpose of enforcing the security, as if the instrument executed by Mr. Clark had been the technical deed of the corporation.

"Upon the familiar principle that equity treats what is agreed to be done and ought to be done as done, and following the principle of many adjudged cases, there would, for the purposes of this suit, — viz., the enforcement of the security, — be no need of a preliminary decree for the reformation of the deed. The parties are not in this court standing upon rights that can be recognized only when they are created in a strict compliance with the technical rules of law, but upon rights that arise upon the substance and reality of the transaction, when there has been an accidental omission to comply with some technical rule of law. Holding, as we do, that the case stands precisely the same in this court for the purposes of the relief sought as if the instrument in question were the legal deed of the corporation, as matter of course the same effect is to be given to it, in all respects essential to the remedy to be applied, as if it were such legal deed.

"It is obvious from what has foregone, that we do not regard the equitable rights of the orators to be of so uncertain a character as, according to a point made by the counsel for the defendants, to render it improper for a court of equity to give relief. Indeed, in our view, it is in no respect uncertain. Their right in equity is as well defined and as well grounded as their right at law would have been, if the instrument executed by Clark had been the technical, valid mortgage of the corporation. The resolutions of the directors, and the instrument made by Clark, in connection with the fact that the corporation issued the bonds for the purpose of their being used for the purchase of the rails, and that the trustees under the other mortgages had notice and knowledge of all these facts, constitute a groundwork upon which the law predicates a

in argument, and not here alluded to, I presume are equally fatal to all claim of priority on the part of the plaintiffs, in any form.

clear and definite equity in the orators, as trustees of the security thereby created. That the subsequent mortgagees misappreciated, and therefore doubted, the rights created by these facts, does not constitute any such uncertainty as, upon any principle, can be made available to them against those rights. This is by no means such a case as *Cordwell v. Mackrill*, 2 Eden, 244, cited by Judge *Redfield*, in his opinion as counsel in this case, though we assent to and adopt the entire doctrine embodied in the language of the Lord Chancellor, in saying that 'a man must indeed take notice of a deed, upon which an equity supported by precedents, the justice of which every one acknowledges, arises; but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends upon their location.' We also accord fully with what was said by the Master of the Rolls, 9 Vesey, 588, *Parker v. Brooke*: 'In *Cordwell v. Mackrill*, Lord *Camden* doubted whether the articles should be reformed, and there may be such a doubtful equity that the purchaser is not to be taken to know what the decision will be, and this is all Lord *Camden* means. But in this case the equity is clear.'

"Nor do we see wherein there appears to have been any negligence in the assertion of those rights. They have on all occasions been insisted on whenever called in question. They have always been regarded and recognized by the corporation, and were recognized and regarded by all parties in the transactions of making the second and third mortgages. This suit was commenced in about one year after the first instalment of the \$25,000 of the principal fell due. Moreover it is to be remarked that the pleadings present no such ground of defence. The defence rests on the alleged incapacity of the corporation to make or become bound by such a mortgage,—on the alleged invalidity of the instrument, on the subsequent mortgages, taken in good faith, and, as is alleged, without notice of the prior mortgage, and on the alleged lack of title of the corporation to portions of the road.

"And we remark further, as to another suggestion of defendant's counsel, that we do not regard the orators as 'standing upon a naked equity against an equal equity and legal title combined.' On the contrary, we regard them as standing upon a prior and superior equity, against a subsequent one depending upon a legal title that was taken charged with such prior and superior equity.

"Without further discussion of points, or comment upon various views and suggestions presented in the argument, sufficient has been said to develop the views and opinions of the court upon the controlling points in the case. The ultimate conclusion is, that the orators are entitled to a decree of foreclosure, and unless the sum found to be due upon the bonds issued under the mortgage to them, as established by this decision, is paid by the time fixed by the Court of Chancery for redemption, with the cost of this suit, that they are entitled to hold as trustees, upon the trusts created by the said mortgage, the said railroad, as against the defendants to this bill, with all and the same rights thereto, for the purpose of using and maintaining the same as a railroad, that the corporation and the other defendants holding under the corporation would have, in case the mortgage to the orators should have been redeemed, in pursuance of the decree herein made, and unless so redeemed, that the orators are entitled to be put in possession of the said road by proper process of the Court of Chancery, in execution of the decree in that court for such foreclosure, and that the orators recover their costs in this court, and may have execution therefor.

"The decree of the Chancellor is reversed, and the case remanded to the Court of Chancery, to ascertain in a proper way the sum due on the bonds secured by said mortgage, and to make a final decree, in conformity with this decision."

I. The questions involved in the present controversy do not arise between the plaintiffs (representing the interests of certain creditors), and the company alone, as debtor. If that were the case, merely formal defects in the execution of the instrument under which the plaintiffs claim, would be of comparatively little moment. For the receipt and retaining of money by the company, of which there is no question in the present case, has often been held to be a confirmation of the contract under which it had been originally obtained.² Very slight circumstances will often be seized hold of by courts, as evidence of the confirmation of a contract defectively executed by the parties, where no intervening rights have accrued. This rule, however, will not apply where the contract was executed under a *defective power*, or where it is, in the case of a corporation, *ultra vires*, of which we shall speak more in detail hereafter.

II. But the important consideration here is, that the controversy arises between different classes of the creditors of the company; and there is no principle of equity jurisprudence better settled than that all *bona fide* creditors, or purchasers, stand upon equal equity.³ And in such cases, courts of equity apply the maxim, that equality is equity.⁴ But the plaintiffs, to maintain their bill, must show a prior lien, legally created upon the property of the company. If they succeed in doing this, a court of equity will not interpose its peculiar powers to defeat such legal priority. Neither will it lend such aid, to enable one creditor to gain an unequal advantage over others, but, as between creditors, and others standing in equal equity, it will leave them to any advantage fairly gained, resulting from their strictly *legal* rights.⁵

III. In examining the plaintiffs' case in this light, the legal defects in the instrument under which they claim priority are so numerous, and so marked, that it seems scarcely necessary to go much into detail in regard to them.

The contract under which the plaintiffs ask to appropriate all the available means of the company to the exclusion of all the other creditors, assumes to be a mortgage, not only of all the real estate and fixtures of the company, but also of all the corporate

² *Whitwell v. Warner*, 20 Vt. 425; *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 236; *Ottawa Plank-Road Co. v. Murray*, 25 Ill. 336.

³ 1 Story, Eq. Jur. § 64 c, and cases cited.

⁴ 1 Story, Eq. Jur. § 64 f, and cases cited.

⁵ 1 Story, Eq. Jur. § 64 c.

franchises, even the very existence of the corporation itself. This contract is executed, too, by a corporation whose charter in terms (§ 9) secures such franchises to the company alone; and when by the general laws of the state no power to assign such franchises existed. This is attempted to be effected without the action of the corporation itself even, but only through the agency of the directors, and by oral proof of the assent of the stockholders, or rather, that when informed of the fact of the attempt to execute such an instrument, *they were silent*. Such an attempt is expressly declared by the House of Lords to be of no validity, if done without the authority of the corporation.⁶ In this case the contract was executed by the secretary by affixing the common seal of the company, which was in his custody, and used by him always in solemnizing contracts, but in this case it was done beyond the scope of his authority.

This proceeding seems to us fatally defective in many indispensable particulars.

1. As the title of the real estate, and especially of the corporate franchises, resides in the corporation alone, it can only be conveyed by the act of that person. The person of a corporation is the artificial being created by its charter, and can act only in conformity with its charter and by-laws.⁷ Hence it was decided in this state, at an early day, after repeated arguments and great consideration, that the deed of all the stockholders, professing to convey the real estate belonging to the company by metes and bounds, did not convey the title of the corporation.⁸ This was upon the ground that the title resided in the corporation, and could only be transferred by the action of the corporation in the mode pointed out in the charter and by-laws of the company in conformity to the general laws of the state; and that the consent of every stockholder, expressed in any other mode, would have no effect in conveying a title which did not reside in them.

2. In regard to the franchises of the corporation, they are in their very nature, in the case of all corporations, strictly personal and inalienable. And in regard to railways, which sustain very important public functions and responsibilities, these franchises are peculiarly inalienable. No principle of the law of corporations is

⁶ *The Bank of Ireland v. Evan's Charity*, 5 House Lds. Cas. 389.

⁷ *Dartmouth College v. Woodward*, 4 Wheat. 518.

⁸ *Wheelock v. Moulton*, 15 Vt. 519.

more clearly established, both in England and America, than this. The cases are too numerous to be here cited.⁹

3. It has been urged in this case, and in many others, where the question has arisen, that this is a question between the corporation and the state. But that is by no means true. It is a question in regard to the *power* and capacity of the corporation. And when a party claims priority of right, through the act of the corporation, it is incumbent upon him to show the existence of such power and capacity in the corporation as to enable it to do that act. Any party interested in the act may take advantage of any defect in the power of the corporation to do such act. This is the case in regard to all attempted acts and contracts of corporations, beyond their powers, or *ultra vires*, as it has been called; and no question has ever been made in the decided cases; but such acts were void, as to all parties interested. So far indeed has this been carried, that in a late decision of the court of C. B.¹⁰ it was held, that a bill of exchange, drawn on behalf of a joint-stock company, which was *ultra vires*, must be held void, even in the hands of a *bona fide* holder.

4. And such act of the corporation, done while there exists no statute authorizing it, and consequently no power to do the act, being *ultra vires*, is so absolutely void, that it is incapable of confirmation by any acquiescence of the corporation, or in any mode, except by some act of the legislature recognizing the void act as valid, or expressly confirming it with the consent of the company conveying. The passage of a general law, after the date of the void instrument, authorizing corporations generally to mortgage their property and franchises, will have no such effect upon past transactions, since all legislative acts will be regarded as prospective, unless made retrospective, in express terms. And a contract made while the corporation had no power to do the act, will remain wholly unaffected by such subsequent statute. To come under the protection of the statute, their acts must be *bona fide* done under it, and not by construction merely. This is the view adopted in all the cases where this question has arisen, and they are very numerous.

⁹ 2 Redf. Railw., § 235, pl. 12, and cases cited. See also *Hall v. The Trustees of Sullivan Railw.*, note *supra*, § 235; *Coe v. Co. P. & Ind. Railroad*, 10 Ohio St. 372. The authorities are all in one direction upon this point.

¹⁰ *Balfour v. Ernest*, 5 Jur. n. s. 439.

IV. It must be borne in mind always, in considering a question of this kind, arising between creditors, that they are only affected by the registry of a prior mortgage, or actual knowledge of a valid conveyance, and consequently cannot be affected by any act, whether of the corporation or the legislature, unless it appear upon the registry, and only from the time when it so appears. Consequently, having noticed a deed executed, which the corporation had no power to execute, they would not be bound to inquire whether the corporation subsequently acquired such power, and certainly they would not be bound to infer that such power was acquired, by any subsequent statute, never calculated or intended to give any such power.

1. And if it could be maintained, upon the proof of an entry in the books of the company merely, to that effect, that the bonds issued under this first mortgage were delivered after the statute giving railways the power to execute mortgages came in force (which is no proof ever, and especially here, where the circumstances afford the most convincing evidence of collusion on the part of the officers of the company, in regard to the validity of this very instrument); if, upon such mere entry in the books of the company, and no proof, it could be assumed by the court, which we know very well never will be, that these bonds were really delivered after the statute came in force, it would make no difference as to these defendants, who stand, and have a right to stand, upon the *mortgage*, and as it *appears* upon the registry; and are in no sense expected to look beyond that in any case. Any the slightest departure from this salutary and inflexible rule would throw all the land-titles in the country into the most inextricable confusion, and would be vastly worse than a repeal of the entire registry system, since it would render it a blind and a delusion, rather than a reliable guide, as it should be, and was intended to be and must be made by the courts, unless they are willing, out of the perversion of good statutes, through false constructions, to heap curses and confusion upon the heads of the people.

2. And the same rule applies if the registered instrument is, in any other statute requirement, defective. It is then not entitled to registry, any more than a note of hand, or any other contract. And its being placed there is of no force or validity, and is therefore not constructive notice to subsequent purchasers or encumbrancers. They are not in law presumed to have seen this false

registry ; they are not bound to look for it, or to take notice of it, even when shown to them, which is not here pretended. These principles are fully recognized in this state.¹¹ And the principle is of universal application, and has been often since recognized.¹² As to the right of creditors to disregard a contract, void on its face, for defect of power to execute it, see *Grosvenor v. Allen*,¹³ where this doctrine is fully maintained.

V. But the instrument under which the plaintiffs attempt to maintain such exclusive claim to priority over the other creditors, is not only executed without any *power* whatever in the corporation to do such act, but it fails, in numerous essential particulars, to meet the requirements of the law, in giving expression to such powers, as the corporation did possess over a portion of the subject-matter, such as their roadway and its superstructure. We say nothing here of the fact that most of this was merely in the future, and not the present property of the corporation. But assuming that they might mortgage it, which is going a great way, since they confessedly could not sell it, having acquired no title, except for use, the instrument under which the plaintiff claims wholly fails to meet the requirements of the law, as a mortgage of the real estate of the company.

I. It is not in the name of the company, and therefore is not their deed, which is absolutely indispensable in order to convey their title.¹⁴ This is held in *Isham v. Bennington Iron Co.*, *supra*, to be indispensable, except under the express provision of the statute of 1815, allowing the deed to be in the name of the president, by the deed reciting the vote of the corporation. But that is altered by the revision, as was held in *McDaniel v. Flower Brook Manuf. Co.*, *supra*. And under the existing statute, as was there expressly held, the deed must be executed in the *name* of the corporation, in the words of the statute, "by an agent appointed by vote for that purpose."

¹¹ *Isham v. Bennington Iron Co.*, 19 Vt. 230.

¹² *Pope v. Henry*, 24 Vt. 560.

¹³ 10 Paige, 74 ; *Walworth*, Chancellor, 77.

¹⁴ This point is expressly decided in the following cases : *Wilkes v. Back*, 2 East, 142 ; *Appleton v. Brinks*, 5 East, 148 ; *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274 ; *Hatch v. Barr*, 1 Hammond (Ohio), 390, where it is said of a deed, naming the president and directors of a corporation as grantors, and signed "Oliver M. Spencer, president" of the company named : "The person who executed it had no interest in the subject conveyed." — "It is therefore no conveyance."

2. But this deed is not only not in the *name* of the corporation, but it was not executed by the *authority* of the corporation, but only in pursuance of the vote of the directors. It has been repeatedly decided that the directors of a corporation have no such power. They are only the general business agents of the company. They have consequently only authority to transact those functions of the company which come under the general denomination or business. And the provision of the charter of this company, defining the board of directors and their powers, that it shall consist of five persons, and shall be competent to transact all the business of the company, does not go beyond the ordinary powers of directors. All the business of a company does not imply any thing but *ordinary business*; what is called the proper business of such company, that is, in the case of a railway, the construction and operation of their road. The general agent of a copartnership has authority to transact all their business, but he could not convey their real estate, or execute a general assignment of their property for the benefit of creditors. The same is true of the general agent of a natural person.

3. It would be contrary to all the received rules for the construction of statutes to give such an incidental expression in a private charter the force of repealing the general statute of the state in regard to so important a matter as the conveyance of real estate by such corporations. And especially would this be contrary to all established rules for the construction of statutes, since it is transferring a provision from one subject-matter; viz., the board of directors and the general business of the company, to the conveyance of real estate, which is not named, and could not, by any reasonable intendment, have been in the mind of the legislature. The assignment of all the franchises and all the property of a corporation would be to *annihilate* and not to “*transact* their business.”

4. But it has been repeatedly decided, that the directors of joint-stock corporations, and particularly railways, have no such powers as are here claimed. They have no power, without a vote of the stockholders, to apply to the legislature for an enlargement of the corporate power.¹⁵ And even where the directors of a company had power to lease the works of the company, it was held that

¹⁵ Marlborough Manuf. Co. v. Smith, 2 Conn. 579.

they could not in the lease give an option to the lessee to purchase, or not the entire works of the company, at a price fixed, at any time within twenty years; and even that a confirmation by a meeting of the share-holders could not effectually sanction the contract, but that the absolute consent of every member of the company was indispensable to give it validity, even as against the company.¹⁶ In regard to the ratification by the subsequent meeting of the share-holders, in the case last referred to, the Vice-Chancellor said: "I think that the meeting could not confer upon the managing body authorities beyond those which were conferred by the deed [or charter of the company]." — "But in my opinion the persons present, although they might bind themselves, could not, even if they constituted a majority of the company, bind the minority; nor could they bind absent parties to the disposal of the real property of this company in a way not contemplated by the deed of settlement." This goes upon the ground that the consent of the majority will not enable a corporation to do an act not within their corporate powers, or to do one within such powers in a different mode from that pointed out in their charter. They can only act in conformity to the charter. And the consent of the majority, or even of all the share-holders, will not enable them to act otherwise than according to the provisions of their charter. Lord St. Leonards said:¹⁷ "If directors" [of a corporation] "do act in violation of their deed or charter in a matter in which they have no authority . . . the thing is not within their power, it is *ultra vires*, and those acts are *altogether null and void*." We could not have a better or a fuller authority upon this point: Since an act "altogether null and void" can never be affirmed. It must, in the nature of things, require what is equivalent to some new action of the corporation, the same as if nothing had ever been done. A void act is the same as no act. There is therefore nothing to be confirmed. It is different where the act is merely voidable or defectively executed.

VI. This attempt to convey the real estate of the corporation by the vote of the directors merely, is in direct violation of the express requirements of the general statutes of the state then in force.

1. It was decided in *Isham v. Bennington Iron Co.*, *supra*, that

¹⁶ *Clay v. Rufford*, 5 De Gex & Smale, 768; s. c. 19 Eng. L. & Eq. 350.

¹⁷ *Bargate v. Shortridge*, 5 House of Lords, Cas. 318.

all such provisions in the general statutes, in regard to the conveyance of real estate, were exclusive; that the expression "may convey," as applied to corporations, means "shall convey," whenever they have occasion to do so, in the mode prescribed. Thus making the provision peremptory, as to the mode of conveyance, and discretionary only as to the occasion. The terms of the statute are: "Any public or private corporation, authorized to hold real estate, may convey the same by an agent appointed by vote for that purpose."

2. The argument that this statute does not require the vote of the corporation, but that the vote of the directors will be sufficient, is certainly at variance with the natural and obvious meaning of the language, and is such a departure from the express words of the former act, that, if there had been any purpose of changing the law, in so important a particular as giving directors authority to convey the real estate of corporations, it would have been fully expressed, and not left to any doubtful construction. This view of the import of the revision of the statutes is in accordance with the uniform course of decision in this court, holding that no alteration of the old law was intended unless it was clearly expressed. And this very statute, upon this very point, was before the court in *McDaniels v. Flower Brook Manuf. Co.*, *supra*, where it is said: "And while these private corporations are required to keep records of their proceedings, and are only to convey *lands by the vote of the corporation*, through an agent appointed for that purpose, a deed executed in the manner this was, without reciting *the vote of the corporation*, will sufficiently indicate where the power is to be found." The court here, in one short sentence of comment upon this very statute, twice use the terms, "vote of the corporation," as the indispensable *power* to convey the title of real estate of the company under the statute. We could not desire any more satisfactory evidence of the proper construction of this statute. And it has seemed to us that nothing short of the exigencies of a particular case could ever have suggested any other construction. We certainly could not entertain any doubt of this construction being always maintained by the court.

VII. The addition to the name of Merritt Clark, "as I am the president of said company," in the body of the instrument, and in the acknowledgment also, with the addition "and the free act

and deed of the company," has no tendency to show an execution *by* the company, or in the *name* of the company. It has been decided, innumerable times, that such a mode of execution would not bind the company, even where the agent had the power to do so.¹⁸ This is the universally admitted rule, as to all sealed instruments executed under a power.¹⁹ The latter case is precisely in point, as the present instrument is executed as agent, but in his own name, by the agent, which renders it the deed of the agent and not of the principal. The two last cases are precisely in point to show that the instrument under which the plaintiffs claim is the deed of Merritt Clark in his private capacity, and not as president of the Rutland and Washington Railway. It is in vain then to argue that it can, by any possibility, convey the title of the company, if this were its only defect. And most of the cases referred to in *Roberts v. Button*, *supra*, are equally in point to the same effect. In fact, there has never been any question among lawyers in regard to this point since the resolutions in Combes's case.²⁰

VIII. The argument that this instrument becomes the deed of the corporation, by the force of the corporate seal attached, was expressly negatived in the case of *Isham v. Bennington Iron Co.*, *supra*, even where the corporate seal was shown to have been attached at the time of the execution. But in the present case it is impossible to say this, both on account of the unusual position of the seal, and the fact that this seal was not adopted by the corporation until subsequent to the date of this instrument. It would be wonderful that under such circumstances any one should ever claim that this impression of the corporate seal rendered the instrument the deed of the company, and was equivalent to signing. It would be far more plausible to claim, that the fact of the seal being attached to the paper, after its execution, amounted to such a material alteration as to avoid the instrument. We might adopt this view if it were not that this impression of the corporate seal was in such a position, being at the very top of the paper, that it could not be regarded as forming or intended to form any portion of the instrument. If it were not for this it certainly must have that effect, since it is certain, from the proof, that the

¹⁸ *Taft v. Brewster*, 9 Johns. 334; cases cited in *Roberts v. Button*, 14 Vt. 195.

¹⁹ *Spencer v. Field*, 10 Wendell, 87; *Steed v. Wood*, 7 Cow. 453.

²⁰ 9 Co. 75.

impression must have been made after the date of the instrument, and there is no doubt the instrument was executed on the day it bears date. And even were the seal affixed, as an act of execution, and we were to disregard the decisions of our own court, it will be found that the English courts now hold that sealing is not equivalent to signing.²¹ It has sometimes been held that in the case of corporations sealing was equivalent to signing. But that is denied in *Isham v. Bennington Iron Co.*, *supra*, and in many other cases.

PART II. Having found in the instrument under which the plaintiffs claim, both an entire defect of power in the company to execute the deed, and a total want of any proper action on the part of the company, as well as an utter want of the proper form and mode of execution, it would seem idle to pursue the subject further. But as we have thus far spoken chiefly of the effect of the registry of a defective deed, and shown that it has no operation upon subsequent encumbrancers, it may be inquired by some, whether there may not exist such notice in fact in the case as to affect the interest of subsequent encumbrancers.

Div. IX. There is no satisfactory evidence of any such notice, except what results from the fact of Miller being one of the trustees in both mortgages, and Baldwin the treasurer of the company (and through whom the present holders of the several mortgage bonds derive their title), having had knowledge of the attempt to execute a former mortgage. But there are at least two unanswerable reasons why these facts cannot affect the interest of the holders of the second mortgage bonds.

1. These mortgage bonds, by the uniform current of the American decisions,²² are regarded as strictly negotiable paper.²³ Of course notice to the payee or trustee, or to any former holder of such paper, cannot affect the interest of the present holders. Any notice of a defect in negotiable paper will be of no avail beyond those to whom it is communicated, unless it is attached to the

²¹ The early cases of *Lemaine v. Stanley*, 3 Lev. 1, and *Warneford v. Warneford*, 2 Strange, 764, are rejected as unsound. See *Wright v. Wakeford*, 17 Vesey, 458; Lord Hardwicke in *Gryle v. Gryle*, 2 Atk. 76; Parker, Ch. B., in *Ellis v. Smith*, 1 Vesey, Jr., 12.

²² With the exception of *Penn. Diamon v. Lawrence Co.*, 37 Penn. St. 353, which rests upon peculiar grounds.

²³ Cases cited *supra*, 239; *White v. Vt. & Mass. R. R.*, 21 How. (U. S.) 575; *Chapin v. Same*, 8 Gray, 575.

paper itself. All the holders of these bonds testify distinctly that they have no knowledge of any former mortgage.

2. The notice to all the parties was of such a character as not to affect them with any fraudulent purpose in regard to the first mortgage bondholders; and that is indispensable in order to postpone the second bonds to the first, even in his hands. The notice of the existence of the instrument under which the plaintiffs claim, was connected with the fact that the instrument was informal and wholly invalid and void. Such notice was then, to all intents as to every one, wholly void and of no effect. No party had any occasion to inquire into a title, when he was told, in the very breath communicating the fact of its existence, that it had never been legally executed by the corporation.²⁴ It was more calculated to put him off inquiry than no notice at all.

3. And it is very questionable whether the fact that Miller was trustee in the former attempt to execute a mortgage could be of any force as to the subsequent mortgage, even if the securities had not been strictly negotiable. 1. He was, even as to an instrument not negotiable, strictly an agent. 2. The notice of the former attempt to execute a mortgage being acquired in another transaction, would be no notice to affect those interested in a different and distinct transaction. 3. By lodging in his hands the \$250,000 bonds for the benefit of the former bondholders, it showed that, instead of attempting to gain an advantage over them by the execution of the second mortgage, he was really doing them a service by procuring them bonds secured by a first mortgage on the road, in exchange for their bonds which were not secured at all. But these questions are not important to the interests of the present *bona fide* holders of the bonds, and need not be here discussed or settled. If it were conceded that Baldwin and Miller both acted fraudulently as to the inchoate rights under the first mortgage, which is very questionable, it will not affect the bondholders under the second mortgage.

4. It is claimed that the other trustees had notice in fact of the first mortgage. But this is denied by them both, and cannot be regarded as sufficiently established. And if it were proved it does not essentially vary the plaintiffs' case. That will not affect the equity of the bondholders any more than notice to the payee, or any former holder of any other negotiable security.

²⁴ 1 Story, Eq. Jur. § 400 *b*, and cases cited.

These trustees sustain no relation of agency by which they can be regarded as representing the future *bona fide* holders of the securities under the mortgage. They are merely nominal parties. This is so declared in *Sturges v. Knapp*.²⁵

This point is settled in *Curtis v. Leavitt*,²⁶ and in numerous other decisions in the American courts, where it has been held that the fact that the trustee, named in railway bonds and in government securities, or those who disposed of them in the first instance, or any subsequent holder, having acted fraudulently or even feloniously, will not affect the title of a *bona fide* holder.

The great difficulty with the plaintiffs' case is, that they have acquired no equitable rights through any agency of the corporation; and the equity of the defendants is most unquestionable, and they, having both the equity and the legal priority, cannot be postponed to an inferior equity.

X. The claim in argument that the court, failing to maintain the first contract in its present form, shall treat it as an agreement to execute a mortgage, and decree specific performance, and also a foreclosure at the same time, we suppose, is one which it will be impossible to maintain upon any powers hitherto exercised by courts of equity.

1. Because the instrument is not, and never was intended to be, a *contract to execute a mortgage*. Such a course would therefore be to *make* a contract for the parties.²⁷

2. But if it were so in terms it could not be legally registered, and therefore the registry would not be constructive notice to the subsequent encumbrancers, and there is no pretence of notice in fact.

3. A decree for specific performance would therefore be impossible, even if the contract to execute a mortgage were conceded.

1. Because of the occurring of the intervening rights of subsequent *bona fide* encumbrancers. There must be notice of the prior equity to entitle the party to a decree.²⁸

2. Because such a decree would be to aid a defective power, and not merely the defective execution of a power, which courts of equity will never do.²⁹

3. The lapse of time is an invincible obstacle to a decree for specific

²⁵ 31 Vt. 54.

²⁶ 15 N. Y. 174, 258.

²⁷ 1 Story, Eq. Jur. § 161, and cases cited.

²⁸ 1 Story, Eq. Jur. § 784, and cases cited.

²⁹ 1 Story, Eq. Jur. §§ 169, 174.

performance.³⁰ If the party have long acquiesced in a contract, it is not allowable for him to demand of a court of equity that it be reformed, or set aside, unless he can show some special excuse for the delay, as that the party was kept in ignorance of his right through the fraud of the other party.³¹

The whole history of equity jurisprudence will not furnish a single well-considered case, where the courts have set up an agreement to execute a mortgage, or the defective execution of a mortgage, as a valid mortgage, against subsequent encumbrancers, unless the holders of the securities under the junior mortgage took them subject to the prior encumbrance in terms, or else with full knowledge of its existence, either constructively or in fact.³² In this last case the second mortgage was defective, but it was expressly recited as a prior encumbrance, and the third mortgage made subject to it. Upon this ground the court held it binding upon those interested under the third mortgage. And in some cases full notice to the subsequent encumbrancers of an outstanding contract for a mortgage, or a defectively executed one, may postpone their claim, where it was taken with full knowledge that the contract or defective mortgage was the consideration for advances made, and was still relied upon by those making the advances as a valid security. Such facts render the conduct of the junior encumbrancer fraudulent.

4. But there is no satisfactory proof of any fraudulent purpose, even in *Miller and Baldwin*. They no doubt regarded the contract under which the plaintiffs claim as wholly inoperative and of no benefit to the bondholders under it. And the testimony certainly does not convince me that *Miller and Baldwin*, at the time the second mortgage was executed, or when *Baldwin* accepted the \$300,000 bonds, had any belief that even the first bondholders relied upon it. *Baldwin* was not conversant with the mode of negotiating these bonds. He came into the company after all that had transpired. And *Miller* was not familiar with the negotiation of the bonds. Every one connected with that transaction, who did communicate with *Miller*, spoke of them as of no validity, even Judge *Smalley*, the counsel of the company at the latter period. It was the most natural conclusion then for him to adopt that

³⁰ *White v. Yaw*, 7 Vt. 357.

³¹ *Savery v. King*, 5 House of Lds. Cas. 627.

³² *Coe v. C. P. & Ind. Railw.*, 10 Ohio St. 372.

view, as he unquestionably did, and acted upon it in good faith, supposing it was the view of the bondholders themselves, under the first contract. And it is not improbable this might have been the view of the bondholders even, and that they would have accepted the provision made for them in the utmost good faith, under the second mortgage, but for the unexpected failure of the company.

After this they very naturally fell back upon the first imperfect attempt to execute a mortgage, as the only hopeful reliance, — *tabula in naufragio*, — literally a plank in a shipwreck. But, at all events, there is no ground of claim that there is any notice which can by any fair construction affect the interest of the present bondholders under the second mortgage. We are not, therefore, called upon to determine absolutely how far the circumstances might affect Miller or Baldwin.

XI. There seems to have been some reliance in the argument for the plaintiffs before the Chancellor, upon the fact that the bondholders under the first contract, obtained the indorsement of very reliable counsel in favor of the capacity of the company to execute the mortgage in question.

1. I am not aware that any such argument will avail the plaintiffs if the contract under which they claim shall finally prove defective and insufficient in law to maintain that priority of right upon which alone the plaintiffs will be able to maintain their bill.

2. But, unquestionably, the *omission* to make proper inquiry or to take advice of counsel upon contracts of great consequence and difficulty, and especially of novel and unusual character, might be regarded as a very significant circumstance, tending to show that the party did not act in good faith; but that they might rather have obtained the best security they could; trusting to the *uncertainties* of the law rather than its certainties. In this view of the case it has seemed rather wonderful to me, that after those to whom these first mortgage bonds were offered in exchange for iron had proposed to act upon the opinion of able counsel in Vermont, indorsing the validity of the mortgage, that opinion should only have extended to the power of the corporation to execute such a mortgage and the effect of using the common seal; and never have been asked, either as to the mode of conferring such power or the mode of its execution, which seem quite as important considerations affecting the validity of the security as any other. But the point is not very important, and there may be some further

opinion indorsing the validity of the mortgage in its present form, if so, the wonder will be how any one could give such advice.

3. If such counsel was given it would seem to me the more wonderful, when it is considered, that the course pursued in executing the mortgage was in violation of all established practice, as well as legal precedent, and especially in contravention of the general statutes of the state, and the reported decisions of the courts. It is natural to suppose that an opinion from well-informed business men could not have failed to elicit the fact, that the instrument under which the plaintiffs claim, was wholly deficient in all the essential legal requisites of a valid mortgage of real estate by a corporation, both as to its form and the power under which it was executed.

4. We do not infer, either from the omission to seek proper counsels, or the fact that rash and imperfect advice was given and acted upon, that any of the parties acted in bad faith. But the facts and circumstances may justly be regarded, perhaps, as affording pretty satisfactory evidence that the officers of the company regarded it as a temporary expedient to save the credit of the company at the time. Their great anxiety seemed to be to satisfy those of whom they purchased the iron, and *not* to be personally responsible upon the contract.

XII. The position of affairs called for despatch, and more or less of reserve, as to all parties.

1. The stockholders along the line of the road, who constituted about one-tenth of the whole, and all who were really so, *bona fide*, and not identified with the promoters of the enterprise, had subscribed under the positive assurance that *no* mortgage should be executed. This, then, was reason enough why it would not be discreet to call a meeting of the stockholders. For any one of such subscribers might place an extinguisher at once upon the whole scheme of the mortgage, by an injunction out of chancery. It would, therefore, not be wise to wake up the suspicions of the stockholders more than was indispensable.

2. From this same consideration, the fact of any such mortgage ever having been attempted to be executed, has all along been studiously kept out of the written reports of the officers of the company to the stated or occasional meetings of the stockholders. It has been named in discourse, and in conversation, at such meetings; but always with the assurance that it was irregular and

inoperative as a mortgage; so that the reputation of its existence has been kept constantly shrouded with the shadow of its being of no force or binding effect upon any one. The votes of the stockholders, therefore, ratifying a subsequent mortgage, sufficient to meet all their indebtedness, is not in fact, or in construction of law, any confirmation of the first mortgage, but rather the condemnation of it as a security, and making provision for securing the debts of the company, by a mortgage properly executed, which was in fact and in law, and in the intention of the stockholders, *the first mortgage* ever created by them.

3. The consideration, too, that the getting up of this first contract was altogether a volunteer matter on the part of the directors, at the time, to brace up the contractors, in a mode not provided for in the contract, affords additional reason why those directors would not desire to give much publicity to the transaction at the time, and to keep up the impression among the outside friends of the company that it was merely a temporary expedient, and never fully carried into effect, and that all which was expected of the company was to make provision at the proper time for retiring the bonds.

4. All this, and much more which might be adduced, convinces me, beyond all doubt, that the officers of the company managed to get along as quietly as possible with the instrument under which the plaintiffs now claim, merely desiring to get it into such state of forwardness as to induce the sale of the iron, and thus maintain the credit of the company and the progress of the works, until the proper time came to secure all the liabilities of the company necessarily incurred in the construction and equipment of its road, by a formally executed first mortgage, and that they succeeded in accomplishing this without exciting much stir out of doors.

5. Perhaps it is not fair to conclude that the directors were fully aware of its manifold deficiencies, but if they were not, it was certainly attributable to their prudent reserve, in not inquiring of their counsel, who should have been able to inform them at once that such an instrument had been decided to be of no validity in this state or anywhere else, many years before. And this is either fraud or gross negligence.

6. And if the bondholders under this contract believed they had obtained the security of a first mortgage upon the property and franchises of the company, present and future, it was what

few others could have ever believed, who knew all the facts in the case, and what the slightest inquiry in the proper quarter would have enabled them to correct. Under such circumstances it would be going further than any late decision in equity has gone, and further than it ought ever to go, to declare that the bondholders under the first mortgage have acted altogether with that degree of watchfulness and circumspection requisite to enable them to demand the advantages of *bona fide* purchasers. They seem to me to be very much in the category of the officers, and all to have been guilty either of fraud or gross negligence.

XIII. And it would be going further than any case has ever gone, under such a lame show of equity on the part of the plaintiffs, to postpone the claims of the bondholders under the second mortgage, when there is not the shadow of proof that they had any knowledge, or any means of knowledge, of the existence of any prior claim of an encumbrance upon the property of the company. It has been decided that uncertain equities, resulting from doubtful constructions, are not such as to bind a *bona fide* purchaser having notice thereof.³³

I conclude therefore, gentlemen, in all sincerity, and I believe in all justice and "impartiality," that you are bound to disregard the claim of the plaintiffs under what they call the first mortgage; and that in doing so you will be sustained by the ultimate decision of the court, affirming the decision of the Chancellor dismissing the bill.

There are many other grounds, upon which, if they stood alone, I should have great confidence that the court must decide against the claims of the plaintiffs upon those only. But these probably may be presented to the court by your counsel, and I have confined myself to such views as seemed to me most obvious and most decisive of the case, as I have always done in similar cases. And I should certainly be surprised, if they should not in the main be sustained by the court in disposing of the case.

³³ 2 Eden, 344; *Parker v. Brooke*, 9 Vesey, 588.

RIGHT OF COMMONWEALTH OF MASSACHUSETTS TO TAKE POSSESSION
OF THE TROY AND GREENFIELD RAILWAY.

1. Possession of commonwealth valid. Foreclosure in ten years after the road is finished and in operation will result from the surrender.
 - (1.) This will not affect the interest under the Smith mortgage. That can only be foreclosed in a court of equity.
 - (2.) The term of redemption extended to the company will give the same term to intermediate encumbrancers.
2. The title of commonwealth unquestionable to the extent of \$2,000,000.
 - (1.) Ordinarily, mortgages for future advances only create lien as advances are made.
 - (2.) Here the commonwealth was bound to make the advances, and the encumbrance was absolute to that extent in the first instance.
 - (3.) The Smith mortgage being made in terms subject to that of the commonwealth, to the extent of \$2,000,000, they can make no objection to that mortgage, or to the right to advance \$2,000,000 under it.
 - (4.) And the subsequent mortgages are an effectual confirmation of the title of the commonwealth on the part of the company.
3. The matter stated more in detail.
 - (1.) The statute giving the power to mortgage the franchise to the commonwealth, any change of location, and all after-acquired property pass, both as incidents of the main thing and by the terms of the statute.
 - (2.) The rule of law against executing a valid mortgage of future acquisitions has no application where the statute confers such a power.
 - (3.) It has been made a question how far the alteration or repeal of the act of 1854 may have postponed the mortgage of the commonwealth.
 - (4.) The alterations seem to have been made at the instance of the company and the contractors, and for their relief, and will not therefore prejudice their rights.
 - (5.) But no subsequent mortgagee can insist upon the rights of a strict surety, and that the terms of the first mortgage shall remain.
 - (6.) He is not a surety for the debt secured by the prior mortgage, and cannot complain of any change in the securities, if the amount is not increased.
 - (7.) The form of the bond and mortgage is valid under general statutes.
 - (8.) It is expressly required, in that form, by the act of 1854.
4. The subsequent mortgages to the commonwealth convenient, but not indispensable.
5. The questions arising on the Smith mortgage are such that it is impossible to give reliable advice in regard to them all.
 - (1.) It is important to inquire whether the bonds are valid or negotiable instruments.
 - (2.) Statute requires them to be payable in twenty years, and not to exceed capital paid in.
 - (3.) This requirement is of binding obligation upon the company, in issuing these negotiable securities.
 - (4.) Railways may probably, without special authority for the purpose, execute negotiable instruments, such as bills of exchange and promissory notes.
 - (5.) But the thing here provided for is the addition of funded capital, to the amount of the previous stock capital.

- (6.) A limitation was therefore placed upon this power of making funded capital.
 1. Should only be done for funding floating debt, and borrowing money for purposes authorized by law.
 2. The funded capital thus created should not exceed stock capital in money.
 3. The securities should not extend beyond twenty years, or bear interest over six per cent, or be in sums less than \$100.
- (7.) The powers of the company are thus clearly defined, and contain an implied denial of the power of raising funded capital in any other mode. The bonds are therefore *ultra vires*, and void, as to the company.
- (8.) They are of no more force in the hands of *bona fide* purchasers. So held in England.
- (9.) The defect of authority is apparent upon the face of the instruments, and he who takes the security of a corporation must look to its powers.
- (10.) The bonds therefore void in the hands of every one.
6. It may be claimed that the mortgage should be upheld as a security for the debt of the contractors, without regard to the bonds.
 - (1.) The general rule is that the mortgage is security for the debt.
 - (2.) Contracts *ultra vires* are simply void, not illegal.
 - (3.) Courts not expected to extend the rule to this transaction.
 - (4.) Mortgage must probably perish with the bonds.
 - (5.) But if the mortgage should be upheld independently of the bonds, it will be merely for the benefit of the contractors.
 - (6.) English case favoring this construction.
 - (7.) Mortgage then solely under control of contractors.
 - (8.) Requisite in this view to inquire into the power of railway companies to execute valid mortgages, without express legislative sanction.
 - (9.) English rule, and probably true one, that no such power exists.
 - (10.) But legislative sanction may be implied, or given after the deed.
 - (11.) And without this, a company having the power to take tolls, may create such a lien upon its property as to give a lien upon its tolls in equity, to be enforced through receiver.
 - (12.) This was the general opinion certainly at the date of this mortgage. More recently the tide sets somewhat against it.
 - (13.) At date of this mortgage, was probably some reason to say that the legislation of this state did make the franchise of taking tolls by railway companies alienable for the security or payment of debts.
 1. The statute allowing the franchise of any corporation for taking toll to be attached on mesne process, and sold on execution, certainly treats this species of property as alienable for security or payment of debts.
 2. But the provisions of the General Statutes as to railway mortgages still more strongly imply the general power to mortgage the franchise of taking tolls.
 3. These provisions can only be made reasonable by being treated as limitations upon the general right of such corporations.
 4. General course, to leave restrictions upon special acts, to those acts.
 5. Probable that the general course of legislation in this state had made the roads, equipments, and franchises of railway companies alienable by these companies for the security of debts.
 - (14.) But if the courts should hold the mortgage operative only upon the personal property, and that part of the road-bed and superstructure owned by the company at the date of the deed : —

- (15.) This would give the second mortgagees the right to redeem the first mortgage, and the commonwealth might be bound to treat it as a subsisting encumbrance, unless it is void upon the grounds above stated.
7. Brief statement of legal force of other liens.
 - (1.) Attachment of iron, as property of Haupt & Co., not valid.
 - (2.) Grounds of this opinion explained.
 - (3.) But statute of 1862 may include this claim upon the iron.
 - (4.) But only to extent of appropriation, and upon full relinquishment.
 - (5.) Claim of Connecticut River Railway for freight of the iron comes within equity of statute of 1862, and probably should be paid to same extent as other claims. But the carrier's lien has probably been waived.
 - (6.) Difficult to say how far provisions of statute of 1863 apply. Probably intended to apply.
8. (1.) The second mortgagees, if their mortgage is valid, may redeem the first mortgage at any time before the foreclosure of their rights.
- (2.) The consent of the contractors to the surrender of the road to the commonwealth would postpone any claim on their part, till after the whole sum necessary to be advanced in completing and equipping the road, whether beyond \$2,000,000 or less.
- (3.) Contractors bound by terms of their consent to same extent as company by surrender. Smith mortgage thus postponed to all claims on part of commonwealth, to full extent of furnishing and equipping the road.
9. Validity of Mr. Bartlett's attachment dependent upon whether the franchise of a railway company for taking tolls is assignable or alienable for the benefit of creditors.
10. Smith mortgage and Bartlett attachment possible clouds upon title of commonwealth. Desirable to obtain opinion of Supreme Judicial Court in regard to their validity.
 - (1.) Court would not probably regard this case as proper to be referred to them by executive or legislative department of the government.
 - (2.) But specific provisions of constitution on the subject reach this case, unless it is to be excepted on special grounds.
 - (3.) The importance of having these adversary rights determined will recommend the matter to the most favorable consideration of the court.
 - (4.) and (5.) Application to the court in equity recommended.
 - (6.) Subsequent encumbrancers should be notified before expenditures made by the commonwealth beyond the \$2,000,000.
 - (7.) Permanent erections made by mortgagee in possession, not ordinarily valid charge.
 - (8.) Should the commonwealth go forward and finish the road and put it in operation, and equity allow other parties to redeem, they would probably be required to repay all such expenditures.
 - (9.) But one case of railway mortgage foreclosure in this state.

OPINION.

THE following opinion in regard to the title of the commonwealth to the property and franchises of the Troy and Greenfield Railroad Company, under the surrender thereof made by the corporation to the commonwealth according to the statute of 1862, c. 156, as

against the bondholders under the prior mortgage to Smith and others, having been substantially adopted by the decision of the Supreme Judicial Court of Massachusetts,¹ is deemed of sufficient importance to be here presented to the profession.

¹ *Commonwealth v. Smith*, 10 Allen, 448. This was a bill in equity, seeking to impeach the validity of a mortgage made July 30, 1855, to the defendants, by the Troy and Greenfield Railroad Company, covering by its terms the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of \$900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. The mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the commonwealth, to secure state bonds to the amount of \$2,000,000, which the commonwealth were to issue, under the provisions of statute 1854, c. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the commonwealth have received two other mortgages upon the railroad and franchises of the Troy and Greenfield Railroad Company, one of which was dated on July 6th, 1860, and the other on March 5th, 1862, and also surrender of all their property from the corporation, subject to redemption under statute 1862, c. 156. On the 4th of September, 1862, the commonwealth took possession of the mortgaged premises in various towns, for breach of condition. The commonwealth, under their mortgages, have, at various times, from October, 1858, to July, 1861, advanced to the Troy and Greenfield Railroad Company large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to defendants, have, at various times, from August, 1855, to July, 1861, issued bonds to the amount, in all, of \$600,000, payable in thirty years from date. All these bonds were issued in good faith, and are held by *bona fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation actually paid in December, 1856, was \$143,905.77.

Hoar, J., delivered the opinion of the court.

"The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity, requires the court to give a construction to the provisions of St. 1854, c. 286. To ascertain what the legislature intended to authorize or prohibit by that statute, it will be expedient to consider first what were the powers of railway companies in relation to the issue of bonds, and the making of mortgages, at common law, or before the statute was enacted. There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special stipulation to that effect, unless restrained by some restriction, express or implied, either in its charter or in some other legislative act. A bond is merely an obligation under seal. A corporation, having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restrained in this respect by express legislation, or by 'the purposes for which it is cre-

1. In regard to the possession of the commonwealth under their mortgage, it is unquestionably regular and valid, and by the terms

ated, and the nature of the duties and liabilities imposed by its charter.' *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 404.

"But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this purpose under the right of eminent domain; whose powers are to be exercised by officers expressly provided by statute; having public duties, the discharge of which is the chief motive of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion insuperable, objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not in its nature transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And, although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation, after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in existence depends upon the due performance of its public duties. Having once established its road, if that and its powers of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot at its pleasure alienate its railroad, and procure another. The whole reasoning of the court in *Whittenton Mills v. Upton*, 10 Gray, 582, in which it was held that a manufacturing company has no power to enter into a contract of partnership, applies with much greater force to the transfer of its franchise by a railroad company.

"No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that the power would not otherwise exist, and afford a solution of the allusion to railway mortgages which occurs in the statutes.

"Coming, then, to the consideration of the act of 1854, we find it entitled, 'An act to authorize railway companies to issue bonds.' The first section recites the purposes for which a railroad corporation may issue bonds; namely, 'for the purpose of funding its floating debt, or for money which it may borrow for any purpose sanctioned by law. This is, on its face, merely permissive. But it presents this alternative of construction. Either the corporation did not, in the opinion of the legislature, have the right to issue bonds, without the permission, in which case all the conditions and limitations attached to the privilege must be held to qualify and define the permission given; or, if the full right existed when the statute was passed, then it seems impossible to give any other sensible meaning to its provisions, except to construe it as prescribing the conditions and limitations under which the power might thereafter be exercised. The question is, Did the legislature intend that these companies should be authorized to issue bonds only in the mode and for the purposes authorized by the statute? If that intention is apparent, it makes no difference whether the language is affirmative or negative. The same section, then, contains two provisions: first, that the issue of bonds shall be authorized by a majority of the stockholders, at a

of the surrender an absolute foreclosure of the rights of the company will follow, unless they redeem, by paying all expendi-

meeting called for that purpose; and secondly, that the amount of bonds issued shall not exceed the amount of capital actually paid in. The second section provides, that such bonds may be issued in sums of not less than one hundred dollars each, payable at periods not exceeding twenty years from the date thereof, and at a rate of interest not exceeding six per centum per annum, payable annually or semi-annually. The language is still affirmative and permissive, but strictly limiting the nature and extent of the act allowed. The third section enacts, that no railroad corporation, having issued bonds under the provisions of the act, shall make or execute any mortgage upon its road, franchise, equipment, or any of its property, without including in and securing by said mortgage all such bonds previously issued, and all other pre-existing debts and liabilities of said corporation. This section certainly implies that a railroad corporation may mortgage its road and franchise under some circumstances, but gives no direct authority to make such a mortgage; and it plainly prohibits any mortgage that does not conform to the rule imposed. The fourth and fifth sections provide securities for the correct issue of the bonds, and for making them binding on the corporation, though sold at less than par.

"The court are all of opinion that the statute was intended to prescribe the terms and conditions on which railroad corporations should henceforth be allowed to issue bonds, and that any bonds which have been issued since its passage, and which do not conform to those conditions, are made in violation of law, and are therefore void. We cannot suppose that the legislature intended to pass an act to make legal the issue of certain bonds which the corporations had full power to issue without such authority, and which would leave all other bonds of equal validity. It must be remembered that these corporations are bodies created for public purposes, that their charters are made subject to repeal or alteration at the pleasure of the legislature, and that the commonwealth has reserved full power to regulate and control their action by general or special laws. The language of the statute is in substance this: 'Such are the bonds which railroad corporations may henceforth issue.' To declare that bonds may be issued on certain fixed conditions, is, in effect, to declare that they shall not be issued in any other manner.

"That bonds issued in violation of a statute are void, was held in a recent case in the Queen's Bench of England, *Chambers v. Manchester & Milford Railw.*, 26 Law Rep. 583. The prohibition in the statute, on which that case depended, was more direct, but the principle applicable to it is the same, and rests on strong foundations of justice and reason.

"The bonds issued by the Troy & Greenfield Railroad Company, for securing which the mortgage held by the defendants as trustees was made, are payable at a period exceeding twenty years from their date, and were issued to an amount very largely in excess of the amount of capital stock actually paid in. The legislature did not mean that such bonds should be made. Their illegality is apparent upon their face, and open equally to the knowledge of the party who issued and the party who received them.

"The bonds being illegal, the mortgage to secure them is illegal also. It becomes unnecessary, therefore, to consider the questions which have been so largely and ably discussed in the argument, to what extent the power to make a mortgage of a railroad has been recognized, or exists by implication under our statutes, and especially whether such a power has been conferred to any extent by the statute of 1854. But it may be well to observe, that the object of that statute seems to have been exclusively the

tures on the part of the commonwealth, within the term limited, ten years after the road is finished and in operation.

(1.) In regard to the effect of this surrender to the commonwealth upon any rights existing under the subsequent mortgage to Smith and others, I do not understand that it was taken with any such purpose, or that it was expected by any of the parties to have any such effect. If not so intended and understood by the parties, it would not have that effect. The general provisions of the statute in regard to foreclosure of mortgages upon any real estate, have no proper application to the foreclosure of mortgages upon railways. The only proper mode of foreclosing a railway mortgage, I should suppose, would be by bill in a court of equity, where the rights of all parties can be secured by proper orders.

(2.) I should regard the giving of ten years to the company for redemption, after the completion of the road, as having the effect practically to extend the right of redemption on the part of subsequent encumbrancers for the same time. This may not be the strict legal effect of such a provision, but it comes very little short of that. But in any view of the right of a court of equity to require the second mortgagees to redeem from the commonwealth at an earlier date than that fixed by contract between the commonwealth and the mortgagors, which I should seriously question, it is certain that the practice of that court is to give subsequent encumbrancers the election to redeem from prior encumbrancers after

regulation of the issue of bonds by railroad corporations, and that mortgages are only mentioned incidentally, with reference to the future security of the bonds, and not with any view of defining or extending the general power of making mortgages. And further, we understand the bonds which are the subject of the statute to be only bonds for the payment of money constituting a funded debt of the company, and do not consider the opinion which we have expressed to have any application to bonds of a different character, and intended for other purposes, such as bonds to dissolve an attachment for the conveyance of land, or the like. Nor do we mean to decide that some of the provisions of the statute may not be merely directory.

"We find no evidence that the commonwealth has ever known or sanctioned the illegal and irregular issue of these bonds, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held, that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the commonwealth gives it a direct interest in the property; and not being expressly made subject to any prior encumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void. The result to which the point decided leads is this: That the defendants, having no title which they can maintain against either of the mortgages to the commonwealth, the plaintiffs have a plain, complete, and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed."

the rights of the mortgagors are effectually foreclosed, and I have no doubt it would be given in this case. ¶

2. In regard to the title of the commonwealth under its several mortgages, I have made very careful examination, and spent a good deal of time in turning the matter over in my mind so as to be able to see it in all its bearings; and it seems to me most unquestionable, to the extent of the \$2,000,000.

(1.) If this were an ordinary mortgage to secure future advances, it would be considered optional with either party whether to continue such advances; and in such case the execution of a second mortgage will bind the property, the same as the first, except as to advances made before that time.

(2.) But here there was, undoubtedly, an expectation and desire in the minds of both the mortgagor and the second mortgagees, that the advances under the first mortgage should be continued to the full amount of \$2,000,000. And the commonwealth was bound, by that imperfect obligation at least by which alone sovereign states are ever bound, to make the advances to the full extent of 2,000,000, provided the company complied with the conditions of the act of 1854, by which they were agreed to be made, or with such qualifications of those conditions as might be agreed upon between the commonwealth and the company, and should not be detrimental to other parties incidentally interested. This, therefore, made the binding obligation of the first mortgage to the commonwealth the same as if they had executed a bond to advance the whole of the \$2,000,000 in scrip. It therefore became a binding encumbrance to that extent, provided the scrip was afterwards advanced, in such a manner as to be acceptable to the company, and not to increase the encumbrance above that sum. This has been often decided.²

(3.) And the fact that the Smith mortgage is made expressly subject to this mortgage, to the full amount of the \$2,000,000, removes all objection on the grounds of any defect in the first mortgage or the amount of the advances to be made under it, so far as the Smith mortgage is concerned. So that, if the first mortgage had been executed without any proper authority on the part of the company, or had been defectively executed in point of form, it being declared a valid mortgage to the extent of \$2,000,000 by

² Crane v. Deming, 7 Conn. 387; Maroney's Appeal, 7 Amer. Law Reg. 169; Hoven v. Kerns, 2 Penn. St. 96; Parmentier v. Gillespie, 9 id. 86.

the subsequent mortgage, that would have made it so as to that mortgage.³

(4.) And the subsequent confirmation of the first mortgage of the commonwealth by the company, after all the important changes in location or in legislation were made, will render it valid as to the mortgagor also. So that nothing more need be said in regard to this first mortgage as a valid encumbrance upon the property and franchises of the company to the full extent of the \$2,000,000.

3. But it may be more satisfactory to state more in detail the grounds upon which I regard this mortgage as good to the full extent.

(1.) It was executed by vote of the stockholders, as I understand, in full conformity with the act of 1854, by which this state aid was first granted, and with the requirements of the general statutes then in force. The statute then in force required railway mortgages to the commonwealth to cover the road, franchise, and property of the company, which this does in terms, the word income being added in the deed, which will not vary the construction materially. The statute also provided that such mortgages shall, as to all future claims against the company, "operate to cover and bind any lands included in the location of the road, the title to which or the easement upon which shall be thereafter acquired, and any additions which shall be made thereafter to the road, by labor, materials, or otherwise" (enumerating every species of property, real and personal, which ordinarily attaches to a railway), "as fully as if the road had been completed, and all said property acquired and owned by the corporation at the time of the execution of the conveyance." This seems to provide in terms for passing any different location which the company might afterwards adopt for their road. And it has been repeatedly held, that under a special authority for executing such a mortgage, all future acquisitions of the company will pass, both under the power, and as an incident to the principal thing conveyed. This was so decided in this state in express terms, and in a case where the mortgagees had not taken possession.⁴ And the same principle was declared⁵ in regard to accessions made to unfinished articles of manufacture mortgaged while in the process of being made. And in the United States Supreme Court the same rule has been applied to the mort-

³ *Coe v. Columbus, P. & Ind. Railw.*, 10 Ohio St. 372.

⁴ *Howe v. Freeman*, 14 Gray. 566.

⁵ *Harding v. Coburn*, 12 Met. 333.

gage of an unfinished railway, upon general principles and without any statute giving the power to mortgage future acquisitions.⁶ And the same principle is maintained in England in the House of Lords.⁷ It seems to me, therefore, that there can no longer be any question in regard to the title of the commonwealth having been impaired by any change in the location of the road. If it came within the powers of the company in regard to the right of deviation, or was subsequently confirmed by the legislature, it will pass under the mortgage; and if the company did not acquire it in one of these modes, it has not the protection of law for its continuance, and we need not spend time in regard to it.

(2.) The rule so often declared in this commonwealth in regard to personal chattels, that they cannot pass by a deed executed before their grantor has acquired the possession of them, has no application to a railway structure, which is more like an unfinished building for manufacturing purposes, all future acquisitions to which, whether by fixtures or improvements, do pass under a prior mortgage, here and everywhere else. But if that rule should be held by the courts in this state to be binding, as to the future acquired personal accessions of a railway mortgaged, which I should question, as it is in conflict with the rules of equity law in every other country where that law prevails, it could not affect a mortgage of future accessions of personal estate, when the mortgage was executed in conformity with express powers conferred by statute for that purpose, as in this case. That was the very point decided in *Howe v. Freeman*, *supra*. And the same principle is recognized in *Seymour v. C. & Niagara Falls Railway*.⁸

(3.) But it has been made a question by some, how far the alterations in the terms of affording this state aid produced by subsequent legislation, and especially in diverting a portion of it from the tunnel and applying it to the road, and in repealing some of the provisions of the act of 1854, which, by the terms of the first mortgage, were to form the basis of the conditions upon which the scrip should be issued by the state and expended by the company, may have postponed the lien of the state to that of after encumbrancers.

⁶ *Pennock v. Coe*, 23 How. (U. S.) 117.

⁷ *Holroyd v. Marshall*, 9 Jur. N. S. 213.

⁸ 25 Barb. 284, 309; *Willink v. Morris Canal & Banking Co.*, 3 Green Ch. 402; *Phillips v. Winslow*, 18 B. Mon. 431; *Pierce v. Emery*, 32 N. H. 484.

(4.) This might seem to be a question of more difficulty, if it did not appear from the nature of these changes that they amounted to nothing more than a relinquishment from time to time on the part of the commonwealth of such conditions in its favor as were likely to prove inconvenient to the company, or, what is the same thing, to the contractors to perform. And being so exclusively for their ease and advantage, and made at their instance, they could not affect the security of the commonwealth, so far as these parties are concerned, if they were more fundamental than they are.

(5.) But in any view, I do not apprehend they could imperil the security of the commonwealth. So far as the company is concerned, they have all been assented to and confirmed by the subsequent mortgages. And as to intervening encumbrancers, I do not conceive that they stand in the situation of a surety in the strict sense of the term, so that he can insist upon the very terms of the contract remaining unchanged. That is true of a strict surety. But that is upon the ground that the surety is upon the identical contract with the principal debtor, and if the creditor consents, by a valid contract, to change the first contract without the consent of the surety, he is released, because the creditor has relinquished the contract by which he was bound, and he is not obliged to perform any other, even though more favorable for his interests.

(6.) But that is not true of a subsequent mortgagee. He is not a surety to prior mortgagees. He is not a party to that contract, and is not obliged to perform it, unless the property is of more value than the prior encumbrances, and he wishes to apply the balance upon his own debt. He is then only a surety, conditionally, and at his own option. There is no privity of contract between successive mortgagees. The right of each successive mortgagee is subject to the burden imposed upon the estate by the prior mortgages, and there is a consequent duty imposed upon the prior mortgagees not to increase or essentially change the character of this burden. But even if this is done, without fraud, it will not defeat the entire security, but only to the amount of the increase or excess thus imposed. The cases are very numerous as to the right to change mortgage securities, without releasing the lien or encumbrance, as to subsequent encumbrancers. They will be found carefully digested in 2 Am. Law Reg. N. S. 1, where the

rule was thus stated by me, before I knew of this case: "Where no actual release of the mortgage securities was intended, as between the parties, and no actual payment of the same has been made in the money of the debtor," notwithstanding any change in the form and nature of the securities, the amount remaining the same, "the mortgage will still be held a valid security."⁹ And I have no doubt that this proposition is fully sustained by the decided cases, and that it will reach changes of a much more radical character than any which have occurred in the present case. The substance of the thing is, and always was, that the commonwealth had a prior claim to any other for two millions of dollars. There has been no essential change in the substance of the thing, and all mere changes in the form and nature of the securities are unimportant. This has been settled in England for almost a century, and for many years in all the leading American states. And of this, subsequent encumbrancers have no equitable right to complain, as long as the burden upon the encumbered estate is not increased.

(7.) The form of the condition of the first mortgage in this case differed somewhat from the provisions of the statute, in regard to railway mortgages executed to the commonwealth. This was given to secure the performance of the bond, which was conditioned to save the commonwealth harmless for issuing the scrip, and to pay interest and principal as it fell due, and to expend the money, and in other respects to regulate their conduct according to the provisions of the statute of 1854, according to the requirements of which the scrip was to be issued. This was in effect "to secure a loan or debt owing or to become due from it to the commonwealth." It is certain it has proved so, and every one much acquainted with such transactions must have expected, at the time the mortgage was executed, that it would prove so. And this, I suppose, may fairly be regarded as the legal construction of the contract.

(8.) But whatever view any court might be inclined to take of this question, it is certain the mortgage is sufficiently legalized in this form by the statute of 1854, requiring it to be executed for this express purpose.

4. In regard to the importance and value to be attached to the

⁹ *Kinley v. Hill*, 4 Watts & Serg. 426.

subsequent mortgages executed to the commonwealth, little more, perhaps, need be said. The latest one does not seem to have been executed in pursuance with any vote of the stockholders, and if not, would not be a valid deed as to the corporation. The former one, although not indispensable to the title of the commonwealth under the first mortgage, was certainly convenient for them to have, as saving all question and all controversy in regard to the validity of the first mortgage, and the extent and validity of the advances made under it. The precise nature and extent of their operation, both as to the company and intervening encumbrancers, has been before pretty fully explained.

5. We now come to the question of the validity of the mortgage to Smith and others, for the benefit of the contractors. The questions arising in regard to this are so numerous, and so difficult, and so wholly unsettled, at present, that I do not apprehend that any one can do much more than to suggest the questions likely to arise in regard to the matter and their probable solution, so as to enable the committee and the governor and council to act understandingly, in regard to possible as well as probable results.

(1.) In regard to the bonds, to secure the payment of which the mortgage was executed, it may be of considerable importance to determine whether they are valid as negotiable instruments, and so liable to be enforced against the company to the full extent of their nominal amount, without regard to the price for which they were sold in the market, or any other equities existing between the original parties, by which the nominal amount might be liable to large deductions or possible defeat. If these bonds are to be regarded as legally issued by the corporation, they are I understand in the usual form of such securities, and are strictly negotiable, so that they may be enforced against the company and all others having an interest in the property of the company of a later date than the mortgage by which these bonds are secured, if that deed is valid. This has been so repeatedly determined in this country that it is regarded as no longer open to question, notwithstanding the English decisions are the other way, having often held what they call railway debentures, which are the same kind of security as our railway bonds, not negotiable. And chapter 53, § 6, of the General Statutes make such bonds negotiable in this commonwealth.

(2.) The statute of this commonwealth, in regard to the issue

of these railway bonds, required that they conform to certain provisions, among which are that they be payable at periods not exceeding twenty years from the date thereof, and to an amount not exceeding the capital stock actually paid in by the stockholders. And by this last expression I understand "paid in" in money or its equivalent. Any other construction I should regard as an evasion and a fraud upon the law; and that has been often so held by courts of the highest authority.

(3.) The bonds in this case were made payable thirty years from date, and were to an amount three or four times more than the amount of the capital ever *bona fide* paid in by the stockholders. The bonds did not, perhaps, in all respects conform to other provisions of the statute, but these are the most unquestionable departures, and the latter point is the most material of any one. They will therefore test the validity of the contracts as well as more. And if it is considered that these provisions of the statute contain a virtual prohibition against railway companies issuing this kind of contracts, without complying with these requirements, there can be no question that these bonds are in conflict with the most favorable construction which could be given by the words of the statute, with a view to uphold them. And I confess, it seems to me very obvious that such was the intention of the framers of this statute. It seems to me an idle and frivolous construction of the statute to suppose that nothing more was intended than to direct in what form and to what extent these securities might be issued by railway companies and at the same time to leave it altogether optional with them whether to comply with the directions or not, and without intending to make any discrimination between bonds issued in conformity with the requirements of the statute and those which were not, in regard to their validity. I can scarcely convince myself that the legislature could have been induced, understandingly, to adopt a statute of no more importance than this construction gives to this. I must conclude then, and for myself have no question, that the proper construction of this statute is that it contains a virtual limitation of the powers of railway companies to those specific requirements, in issuing these negotiable bonds.

(4.) I am fully aware that it is possible to take another view of this question, and one which will uphold the validity of these thirty year bonds, issued for many times more than the statute

allowed. There is undoubtedly a general right in these business corporations, resulting from the express terms of their charters and the implied necessities of their organizations, to execute any contracts needful or necessary for carrying their powers into effect in the ordinary mode. And the express power to contract, with the implied power to execute such classes of contracts as are usual in similar business operations, will, no doubt, extend to the execution of contracts under seal, and contracts not under seal. In other words, railway corporations, as the business of construction, equipment, operation, and repairs, is now conducted, may perhaps execute bonds, bills of exchange, and promissory notes. But this has been very much contested in England, and the decisions in regard to what particular corporations may issue bills of exchange, have not marked out any very clear rule there, unless it be that *prima facie* such corporations cannot issue negotiable securities, unless there is some provision to that effect in the charter of the company or in the general laws touching the matter, or unless the nature of their business, as defined in their charter and the general laws, is such as to indicate a necessity, or at all events an important convenience, in the use of such instruments. And this I think is the true rule upon the subject, and the one sustained by the weight of present authority, and which must ultimately prevail.

(5.) To apply this rule to the present case, it should be borne in mind that the general laws of the commonwealth as to railway corporations, or any other corporations, are to be regarded as virtually forming a part of the charter of each company, and the powers of the company are to be judged of as if the provisions of these general laws were specifically repeated in each particular charter. I could have no doubt then that the provision of the general statutes in regard to these bonds, if it had been found in the charter of this particular company, would convince every one that it was intended to fix the only mode of issuing these securities, and that the company would have no power to issue them in any other way, whatever might have been the power of the company in this respect without any special provision on the subject. But this is only another form of stating the effect of such general legislation. It has been a thousand times decided, and every one understands, if he is at all experienced in the law of corporations, that the general laws of the state form the funda-

mental or organic laws of all corporate life or action, and that their force is precisely the same as if they had been re-enacted in the grant of each particular charter. And we might state here the reason why the commonwealth might choose to make a special limitation upon the powers of corporations in regard to this species of grant or security. The transaction here contemplated, on the part of railway companies, is essentially different from that of issuing bills of exchange or promissory notes, or any other form of security which has reference to a single transaction or emergency. The thing here provided for, and which was made to apply to all railway corporations in the state, was the creation of funded capital, in addition to the ordinary stock capital, and which was expected to remain for such length of time as should be necessary for the exigencies of the company, and at the same time was not so long as permanently to change the character of the corporation or the interests of the share-holders. This transaction was something very important to the fundamental character and powers of all railway companies in the state. And whatever views the legislature might have entertained of the general powers of such corporations in regard to issuing bills of exchange and other negotiable securities, it was very natural that they should understand, as I have no doubt they did, that they would not, upon general principles, be regarded as clothed with the implied power to increase their capital at will in this mode.

(6.) A limitation was therefore very naturally and properly placed upon this proceeding, and its true boundaries defined:—

1. In providing that it should only be done for the purpose of funding their floating debt, and for borrowing money for purposes authorized by law.

2. That the entire fund thus added to the capital of the company should not exceed the capital stock actually paid in, or in other words, that the funded capital thus added should not exceed the actual working-stock capital of the company.

3. That the security representing this funded capital should not be in sums less than one hundred dollars, should not extend the time of payment beyond twenty years, or bear a rate of interest above six per centum.

(7.) The powers of the company are thus clearly defined, and it seems to me that these provisions must be understood as containing an implied denial of the right or the power of this kind of

corporations to issue this class of securities for any other purpose or in any other form. I must conclude, then, that the bonds in this case, not being issued in any essential particular, in conformity with the powers of the company granted for that purpose, are strictly *ultra vires* as to the company, and of no binding force.

(8.) But as these securities are of a negotiable character, and may very probably have gone into the market, and may now be in the hands of *bona fide* holders to an amount far beyond what the contractors had the right to use by the terms of the contract, it may be important to consider how far these securities can be held binding, either upon the company or upon prior encumbrancers, in the hands of *bona fide* purchasers. It is well settled in England, and, as it seems to me, upon satisfactory grounds, that even negotiable securities, issued by corporations beyond their powers, or *ultra vires* as it is called, can have no binding force in the hands of any one, however fairly obtained or fully paid for. It is in effect the same as the negotiable security with the name of a natural person, which was forged, or subscribed by some person claiming to be his agent, but having in fact no such authority. Those who take even negotiable paper in the market, if not bound to inquire into its consideration, must look at the title of the person from whom they take it, and know that it was properly executed in the first instance, and that it has been regularly transferred. This has been expressly decided with reference to a bill of exchange issued in the name of a public company, which had no power to issue such securities for that purpose when the defect of power appeared on the face of the bill, or was known to the party.¹⁰

(9.) In the present case these securities may be in the hands of many persons not cognizant of the fact that they were issued for a purpose unauthorized by law. But on the face of the bonds it appears that they were issued for a term of years not authorized by the general powers of the company. And any person taking even negotiable securities upon the credit of any corporation which is a party to it, must at his peril learn the powers of the company, whether they depend upon its charter or the general laws of the commonwealth, before he can be said to have exercised due caution in giving credit to the paper on the responsibility of the company.¹¹

¹⁰ *Balfour v. Ernest*, 5 Jur. N. S. 439.

¹¹ *Balfour v. Ernest*, *supra*, *Willes*, J.

(10.) I conclude, therefore, without hesitation, that these bonds are void securities in the hands of all persons, both as against the company and prior encumbrancers. And this might seem to have effectually disposed of the Smith mortgage, and upon grounds satisfactory to most minds, since, if the bonds were of no validity, the mortgage given for their security and payment could scarcely be more valid. I was at first myself inclined to adopt this view as entirely satisfactory, and I still believe that it is so. But I have deemed it proper to suggest another plausible view which has occurred to me as the only possible ground upon which an argument can be maintained in favor of the Smith mortgage-security.

6. It is not improbable that it may ultimately be claimed by the parties interested in this Smith mortgage, that it was intended more as a security for the debt of the contractors than for the bonds issued on that account, and that the mortgage may be upheld as a security for the benefit of the contractors, without regard to the validity of the bonds. It may, therefore, be prudent to examine the subject in this view.

(1.) It is certain that the substance of all mortgage securities is the assurance of the payment of the debt, and that this will not ordinarily be affected by the particular form in which the securities were originally drawn, nor by any subsequent change in the securities, so long as the debt remains unpaid, provided the debt be sufficiently identified in the deed.

(2.) It is apparent that the courts have not treated contracts which have been attempted to be executed by corporations, but which prove beyond their powers, or *ultra vires*, as tainted with any such illegality as attaches to contracts, the object and purpose of which involve legal turpitude, which includes all contracts whose basis or consideration rest upon that which is either *malum in se*, or *malum prohibitum*; i. e., which is either in contravention of morality and decency in general, or against the requirements of any positive statute. This subject is extensively discussed in a late case in the New York Court of Appeals.¹² We might refer to a large number of cases, English as well as American, where this subject has been lately discussed by the courts. The tendency everywhere now is not to regard the contracts of corporations

¹² Bissell v. Mich. So. & N. Ind. Railw., 22 N. Y. 253. So, also, in Parish v. Wheeler, Id. 494.

which fail merely for want of power in the companies to execute them, and which contain no intentional or inherent vice, as tainted with any such illegality as will defeat other contracts, merely because joined with such contracts as are *ultra vires*. And on this ground it may be claimed, perhaps, with some degree of plausibility, that the mortgage executed in connection with these bonds, is not rendered invalid by their failure, provided it can be fairly construed as intended to secure the debt to the contractor as well as the bonds.

(3.) I should myself very much question whether the courts will ever be inclined to listen favorably to any such construction of this mortgage. For although the contract with, and the debt to, the contractors are sufficiently recited in the mortgage, it is not executed in the name of the contractors, or in terms to secure any thing but the principal and interest of the bonds; and it is certainly a very liberal construction to apply the security not only to the original debt for which the bonds were given in payment, but for the benefit of a party not named in the deed except incidentally, and as ultimate *cestui que trust*.

(4.) And I cannot convince myself that if these bonds were got up between the company and the contractors, as much in contravention of the true spirit and purpose of the statute, as I have already indicated that it seems to me they were, the courts of the commonwealth will extend to the mortgage any such favorable construction as will be required to uphold it. I should expect if the courts construe that portion of the law as I do, that they will say that these parties were bound to understand that the whole scheme of these bonds and of the mortgage for their security, as a formal addition of funded capital to the regular stock capital of the company, can be regarded as nothing less than an attempt to evade the law, and defraud the stockholders, if there were any *bona fide* such. If the courts take the view of the subject of the bonds which I do, they will most unquestionably say that the mortgage must perish with the bonds.

(5.) But if they should be induced to adopt the more favorable construction, and to uphold the mortgage as a security, in the names of the trustees, for the benefit of the contractors, it will stand the same as if it had been so expressed originally, and the bonds had never been issued. It will then stand as a security to the contractors for that portion of the contract represented by the

\$900,000, as fast as the work progressed. In other words, this mortgage, if in other respects valid, will be construed as a security for such proportion of the \$900,000 as the work already done by the contractors bears to the whole work.

(6.) There is one English case¹³ where a somewhat similar construction was adopted in favor of the mortgage of a corporation. The statement of the case, in the language of the learned judge, *Sir John Romilly*, M. R., will show the analogies to the present case. "The deed recites the execution of works by the plaintiffs, that a sum not exceeding £5,000 was due from the company to the plaintiffs, and that bills of exchange were given for the £5,000 and the interest. Then it witnesses that the mortgage was given for securing the said principal and interest money at the maturity of the bills of exchange. It is therefore in fact a mortgage to secure the payment of the £5,000 and interest and not the bills of exchange. It is true, the proviso is, on payment of the bills of exchange as they fall due." It turned out that the company had no power to issue bills of exchange, and they were therefore void against the company, but this was not understood by the mortgagees when they accepted the mortgage. The court held, that notwithstanding the bills were void as being *ultra vires* the mortgage was a valid security for the debt due the mortgagees for the construction of the works of the company.

(7.) And in this view of the subject there will be nothing of a negotiable character belonging to the mortgage, but it will be solely under the control of the contractors, as much as if it had been executed in their names only. And the acts and deeds, or other contracts of the contractors, will qualify, control, or postpone this Smith mortgage, unless some other party has acquired an interest under it, and given notice of such interest to the company and to all holding prior liens upon the property, of which I have not heard.

(8.) It will be requisite in this view to inquire into the right or power of railway companies to execute a valid mortgage without legislative sanction expressly given for that purpose; and, if that power exists, to what extent.

(9.) In England, it seems well settled that a railway corporation, without legislative authority for that purpose, cannot enter into any contract of lease, mortgage, or sale, with any person,

¹³ *Scott v. Colburn*, 5 Jur. N. S. 188.

natural or corporate, which contemplates the transfer of the possession of their road, either presently or in any future contingency, contemplated and provided for in the contract. This, I think, is the true rule upon the subject, and the one which will be likely ultimately to extend everywhere, so far as the principles of the common law of England governing corporations extend; and that is pretty generally throughout the United States.

(10.) But it is not, by this rule, indispensable that such legislative sanction should have been had in advance of the execution of the contract, or that it should be given in express terms. It will be sufficient if given in confirmation of an existing contract, executed without any such authority, or if it be the result of reasonable implication, either from the course of legislation upon the general subject or from the special provisions of any particular statute.

(11.) And it has never been made a question anywhere that a railway company, like any other business corporation, might create a valid lien by way of mortgage upon its property, real and personal; and that where a corporation has the franchise of taking tolls, such mortgage might be so made as to create a prior lien upon such tolls, and all this might be done under the general powers of the corporation, and would be carried into effect by a court of equity, either through the officers and agents of the corporation by making them its receivers for that purpose, or else by the appointment of other receivers. That seems to be recognized in the case of *Shaw v. Norfolk County Railway*,¹⁴ the only case where this question has arisen in this commonwealth. *Merrick, J.*, there said: "If any question could ever have been supposed to exist in regard to the transfer of the franchise, there certainly could have been none concerning the conveyance of the land and personal property." And to give the conveyance of the property of the company any reasonable operation, it must be treated in equity as creating a lien upon the tolls or earnings of the company, to be secured by putting the works temporarily into the hands of a receiver, acting under the orders and control of a court of equity.

(12.) This, I think, was the general view held by the courts and profession in this country at the date of this mortgage. And I am not prepared to say it is not sound, though attended with some difficulties and embarrassments in the detail. But in the

¹⁴ 5 Gray, 162.

period which has elapsed since that time, some of the American states have gone so far as to say that a railway company, without legislative authority, cannot create any valid lien upon its road-bed and superstructure.¹⁵ The tendency of recent decisions in this country is certainly in that direction, and I have rather thought it might ultimately prevail throughout the country, although not fully convinced of its soundness.

(13.) But it seems to me at the date of this mortgage, if its validity should ultimately be made to depend upon the power of railway companies in this commonwealth to execute such contracts, that there was some good reason to consider that the existing statutes did virtually recognize such a power.

1. There has existed in this state for many years a statute,¹⁶ by which the franchise of a turnpike or other company for the taking of tolls, and all the rights and privileges thereof shall be liable to attachment on mesne process, and by other sections, it is provided that the same may be sold on execution, and that the officer's return of the sale shall transfer to the purchaser all the privileges and immunities which by law belonged to the corporation, so far as relates to the right of demanding tolls. I think it can scarcely be claimed that the class of corporations included under these provisions may not mortgage their property and franchises to the same extent to which they are made liable to attachment and sale on execution. And although this provision may not include railway companies in terms, it certainly is not very obvious why any distinction should be made in this respect between turnpike and bridge corporations and railroads, since all the early railway charters in this state contained the express provision that any other company might run its carriages upon the road, by paying a specified or reasonable toll, to be fixed for that purpose. And the General Statutes, on the subject of railroad corporations,¹⁷ provided that each corporation may establish, for its sole benefit, a toll upon all passengers or property conveyed or transported on its road; so that railways are literally companies authorized to take toll, and it is not improbable that the courts may regard this statute as making their franchises liable to levy of execution. If so it would seem it must be subject to being mortgaged by the company to the same extent. I know that the statute

¹⁵ *Coe v. Columbus, P. & Ind. Railw.*, 10 Ohio St. 372.

¹⁶ General Statutes, c. 68, § 25.

¹⁷ Ch. 63, § 112.

already cited may be, not improperly, so construed as to limit its application to other companies authorized to take toll, in the same way turnpikes do, for the use of their road for the passage of carriages owned by the persons paying such toll, and thus be held not to include railways. This is not an unusual construction of statutes to limit the application of general words to kindred objects, as those *ejusdem generis*. And judging from the more common mode of construing statutes by the courts here, and the general impression of the profession in regard to the extent of the statute now in question, I should rather expect it to receive this limited application. But in any view, this statute must be regarded as dealing with this class of property in such a manner as to show that it is regarded as alienable for the security or payment of debts.

2. But I am still more confirmed in this view by another provision of the General Statutes on the subject of railroads. It is provided ¹⁸ that when a railway company shall have issued bonds in the manner before pointed out, it shall not subsequently execute a mortgage upon its road, equipment, or franchise, or any of its property, real or personal, without including in and securing by such deed or mortgage all bonds previously issued and all pre-existing debts and liabilities of the corporation. The latter section provides how the property shall be managed when any such mortgage is executed.

3. These provisions proceed, I think, upon the assumption that such a mortgage may be executed at any time, under the general powers of railway companies. It could only be made a reasonable provision by regarding it as a limitation upon the mode of exercising a power already existing in railway corporations. It would be absurd to suppose that it was intended to limit special powers thereafter to be obtained from the legislature, either by special act or in the charters of future corporations.

4. The uniform course of legislation undoubtedly is to leave restrictions upon powers which can only be obtained by special act, to the discretion of the legislature at the time of granting them. This is the only reasonable or respectful course, and the only construction which I should expect the courts of this commonwealth ultimately to adopt.

5. I should therefore consider that the general course of legis-

¹⁸ Gen. Stats. c. 63, §§ 123, 124.

lation upon the subject in this commonwealth had recognized the right of railway corporations to create mortgages upon their "roads, equipment, and franchises."

(14.) But if the courts should hold, as very probably they may, that there is no general power to be implied from the legislation of the state for railway companies to mortgage their franchises of operating their roads and taking tolls, then the mortgage is good, at most, only as creating a lien upon the property. And if the courts of this commonwealth should apply the rule upon this subject which they have hitherto manifested a very strong inclination to apply to all mortgages of personal property, as between natural persons, the mortgage could only operate upon the road-bed and its accessory fixtures, and such personal estate as the company had at the date of the deed. And as the location of almost the entire road has been changed since that time, the mortgage could only hold that portion of the road-bed which remained unchanged, with its accessory fixtures.

(15.) But even this may, if valid, and I do not see but it must, entitle the parties interested under this mortgage to redeem the whole road, and hold it until they are reimbursed their own debt, with all sums paid by them to prior encumbrancers, so that the commonwealth will have to treat this Smith mortgage as a valid subsisting encumbrance, either upon the road-bed, or else upon the whole structure, with all its accessories of real and personal estate, unless it is invalid upon the first ground suggested by me. And I am decidedly of opinion that it ought to be regarded as invalid upon that ground, and that it probably will be so regarded by the courts. But as the questions are entirely new, and have not been argued by counsel, I could not feel perfect confidence in such a conclusion.

7. In regard to what other liens or encumbrances exist on any of the property claimed by the commonwealth under its mortgages, &c., I may be very brief. I have not been informed of any which are claimed to exist, except the attachment upon the iron as the property of Haupt & Co., the contractors, and the attachment in favor of Mr. Bartlett.

(1.) The validity of the attachments upon the iron will depend upon the question, whether the title to the iron had vested in the railway company. I have spent less time upon this question from the view which I have taken of another question suggested by the

committee, which it will be perceived renders this of comparatively little consequence. But it seems to me that it must be considered that the title to the iron had sufficiently vested in the railway company for them to hold it as against the creditor of Haupt & Co.

(2.) For it cannot be doubted that the title had vested in Haupt & Co. The very attachment by the Rensselaer Iron Company, from whom the contractors purchased it as the property of Haupt & Co., would be an effectual waiver of any claim they might have as vendors against Haupt & Co., on the ground of a lien for the price, and that the title still remained in them. And considering the title as having fully vested in the contractors, their negotiations with the state engineer and the commonwealth through him, must be regarded as negotiations with the company for the purpose of acquiring the title, in order to secure the commonwealth for the scrip to be advanced upon it. In this view, it seems impossible to question that Haupt & Co. did sell and take pay for the iron, under the express agreement that the title should pass to the company in the present tense, and that they should accept the commodity in the place where it then lay deposited, upon the grounds of a neutral party. This being so, it would no longer be the property of Haupt & Co., and their attempt to hold it by virtue of these attachments against themselves would be not only illegal but fraudulent. It is true that the creditors would not be injured by any fraudulent acts of Haupt & Co., but they would be bound by their acts in transferring the title, and accepting payment for it. I should feel no doubt, then, that these attachments, if tested by judicial process, will prove of no validity as far as the property is concerned.

(3.) But I may here consider the question suggested by the committee, whether the act of 1862¹⁹ has not provided for the payment of these very claims and the discharge of these attachments, to the extent of the appropriation made for that purpose. From all the facts which have been made known to me, I have not been able to give the statute any other construction than that it was intended to reach all claims, either against the company or the contractors, for labor, materials, or land damages, which had *bona fide* gone into the construction of the road or its equipment, and which had not been paid for. This will then extend to this iron,

¹⁹ Ch. 156, § 3.

after it is put into a position to go into the road. And upon dissolving the attachment, I suppose it will come into that position.

(4.) But of course these claims cannot be paid except to the extent of the appropriation. And as the claims for land damages constitute a valid lien upon the roadway against the company and all encumbrancers, unless such lien has been legally released, those claims will probably have to be paid in full, and the remaining claimants must be contented to receive such a dividend as the proportion which the whole appropriation bears to the whole amount of the claims will allow, and release the whole of their claims, which they will no doubt gladly consent to do. But this construction of the act is only of the first impression, and with very imperfect knowledge of the minute details of the facts. But I have seen or heard nothing which inclines me to doubt that it is correct. If so, it renders the validity of the attachment of no importance. But if the whole question turned upon the validity of the lien created by the attachment, I should feel compelled to advise against its being so treated.

(5.) In regard to the claim of the Connecticut River Railway Company for freight upon this iron, I could not advise very confidently, without learning the facts more minutely. But as the claim is small, and probably meritorious, it would very likely come within the equity of the other claims, and I suppose it has been allowed as such, and will be paid if the others are, and in the same proportion. There is no doubt of the lien of carriers of goods for the freight of those particular goods, but not upon what remain undelivered for the general balance of freight accounts, without a contract to that effect. And an agreement to give credit for freight, or delivery of the goods without its payment, will be regarded as a waiver of the lien. My impression is, that if the facts are carefully sifted, there will prove to have been no lien upon this iron for the freight. The agents of the railroad seem to have consented to have Haupt & Co. treat it as not only delivered to them, but to the company, for the benefit of the state, and to let it remain upon their land for that purpose. And a portion of it was actually removed to the lands of the company, and laid in places convenient for attaching it to the superstructure of their road. I should presume, under these circumstances, that, as against the company or the commonwealth, the carrier's lien would be regarded as waived. But it will probably be paid its proportion of the appropriation.

(6.) I cannot say how far the provisions of the act of 1863²⁰ were intended to apply to any liens upon this iron, by attachment or otherwise. The provisions of this section are very general. It might apply to all claims or encumbrances upon any portion of the road and its property. I think it highly probable that the legislature, both in 1863 and 1862, expected the liens upon this iron, whether real or pretended, to be paid or compromised by the commissioners, under the advice of the governor and council. This I have said in answer to a special inquiry.

8. (1.) There is no doubt that the second mortgagees, if any such legally exist, may redeem the encumbrance in favor of the commonwealth, at any time before their rights are absolutely foreclosed. From what has already been said, it will be obvious that I should have no great doubt they must, in that event, pay whatever had been paid by the commonwealth, within the limit of two millions of dollars, and that up to this point the commonwealth would be protected in expending money upon the road or tunnel. And as this Smith mortgage can only be upheld for the benefit of the contractors on the most favorable view, and the commonwealth have no knowledge of an assignment of that debt which might create an equity in other parties, the deed of the contractors, consenting to the surrender and postponing their claim until all the advances of the commonwealth, whether made before or after, are paid, must be regarded as binding upon the second mortgagees, they being mere trustees for the benefit of the contractors.

(2.) In this view, and I have no doubt of its soundness, the second mortgage, as a legal security to the contractors for any sum due them (and it is of no validity in any other light), seems to be postponed, not only to all sums then advanced by the commonwealth, but to all which should be thereafter advanced by them, and this would postpone the Smith mortgage not only to the \$2,000,000 secured by the first mortgage, but to any sums which it was fairly to be presumed the commonwealth might have to advance, judging from reasonable probability at the time the road was surrendered, and this would seem to extend to the completion of the road and tunnel, since the deed of the contractors, consenting to the surrender, is made with reference to the surrender itself. And that instrument seems, by implication certainly, to contain a binding consent on the part of the company that the

²⁰ Ch. 214, § 5.

commonwealth may proceed to complete the entire road and tunnel, and that the company only reserve the right to redeem within ten years after the road is completed, and put in operation, by paying, of course, all sums advanced by the commonwealth, and interest thereon, deducting the net earnings of the road.

(3.) And if the company are thus bound by their surrender to allow the commonwealth to go forward and complete their road, I do not see why the contractors, by their deed consenting to the surrender, are not bound to the same extent. And if so, I think it will dispose of the Smith mortgage in every view as an impediment in the way of the commonwealth going forward, if they deem it expedient, and finishing the road and its equipment. It is true the title of the commonwealth will be only that of a mortgagee in possession, and they will always be liable to be called to account, either by the company or by the second mortgagees, if their title is of any validity, until those interests are foreclosed, which cannot, in the present juncture of affairs, well be effected until ten years after the road is completed. This is in response to special inquiries of the committee.

9. In regard to the attachment in favor of Mr. Bartlett being valid as a lien upon the franchise of the corporation, which I suppose was intended, though I have not the return of the officer, that will depend upon the question how far railways are to be regarded as coming within the statute already alluded to, and that depends in great part upon the same considerations which have been already commented upon. The existing statutes, in regard to creditors attaching on mesne process, and reaching on execution any interest in real estate, either equitable or legal, would enable, I should suppose, creditors to reach any property interest of railways which it would be in the power of such corporations to assign or transfer for the benefit of creditors. And whether the general statutes of the commonwealth, or those in regard to levying upon the franchises of corporations for taking tolls, should allow of creditors taking this interest in railway companies; or they could assign or transfer this interest by way of mortgage or assignment for the benefit of creditors, or not, the other franchises and responsibilities of the corporation, both public and private, still remain as before. This is so held in *Commonwealth v. Tenth Mass. Turnpike Co.*²¹

²¹ 5 Cush. 509.

10. Considering, then, the mortgage in favor of Smith and others, and the attachment in favor of Mr. Bartlett, as possible clouds upon the title of the commonwealth in the nature of subsequent liens, and that is the most which can be said in their favor ; the question arises, whether the opinion of the Supreme Judicial Court should be invoked in regard to the questions involved. There is no doubt that would be exceedingly desirable if it can be readily obtained.

(1.) But I should not expect the courts would regard this transaction as coming within the range of those questions which the executive or legislative branches of the government may properly refer to their determination, for the assistance of those departments in the proper discharge of their own duties. This is more in the nature of an ordinary question of adversary pecuniary interests than any question I have ever known to be determined by the court in that way.

(2.) In looking at the provision²² of the constitution, by which it is provided that each branch of the legislature, as well as the governor and council, shall have authority to require the opinion of the Supreme Judicial Court upon important questions of law and upon solemn occasions, there would seem to be no great doubt that the present case presents both of the contingencies, in which it is provided that the opinion of the Justices of the Supreme Judicial Court may be required, unless there is something else in the case which takes it out of the class in which it is proper to proceed in that mode. These questions of law are more numerous and more important than will ordinarily occur in any one case ; and the occasion is more grave, so far as mere pecuniary interests are concerned, than commonly arises. And the enterprise involved embraces questions, in the opinion of many certainly, more serious than the mere pecuniary interests at stake.

(3.) These considerations will weigh very seriously with that tribunal, in inducing them to meet the emergency with reasonable disposition to relieve all embarrassments as far as possibly in their power, in whatever form the questions are brought before them. The section in the constitution referred to, unquestionably has primary reference to matters of public concern. But many such also involve private rights and interests to a very large extent. And the Justices of the Supreme Judicial Court have on many

²² Ch. 3, § 2.

occasions responded to applications for opinions from the executive and legislative departments where questions of private right have been largely involved. This point, I find, has been felt and discussed by the justices on former similar occasions, and opinions nevertheless given with the protest that they were not to be regarded as binding upon the private rights of persons involved.²³ Such an opinion, if not binding upon the parties, would fail to meet the emergency here.

(4.) How far the Supreme Judicial Court, as a court of equity, might be disposed to hear and determine these adversary rights and claims, with a view to enable the commonwealth, as a mortgagee in possession, to go forward safely and expend money in the completion and equipment of the road, can only be determined on application. There are many circumstances peculiar to this case, which might fairly be thought to have considerable weight in inducing the court to entertain such an application, at least to the extent of declaring that the commonwealth be allowed to go forward and finish the road and put the same in operation, and that for their advances for this purpose they should have the prior lien upon the road and equipment.

(5.) And there is great reason why the extent of all these adversary interests should be determined in advance, in order to enable all parties to act understandingly in the matter. And there is one statutory provision which might seem to favor such a preliminary application to the court.²⁴ The committee, or the governor and council, will be able to judge of the propriety of instituting such an application. It seems to me so desirable to have these adversary rights determined now or soon, and that this case is so peculiar that the court, if made fully to comprehend the importance of a preliminary decision, would be likely to listen to such an application. But of course such an opinion is rather based upon conjecture than knowledge.

(6.) Should the commonwealth determine to proceed to any expenditure upon the road or tunnel beyond the amount of two millions, without such a previous application to the court, it would certainly be desirable to notify the trustees and contractors interested under the second mortgage of such purpose, and that, if the second mortgagees object to such a course under a claim of a prior lien to such expenditures, in the completion of the road and its

²³ 9 Cush. 604; 5 Met. 597.

²⁴ Gen. Stats. c. 134, § 49.

equipment, they will be required to lift the encumbrance of the commonwealth, or devise some method by which the road can be completed, or made available in its unfinished state ; and that, in default of such action on the part of the second mortgagees, the commonwealth will proceed to finish and put the road in operation, and insist upon their advances for that purpose being regarded as the first encumbrance upon the road. This should be done, if at all, in such a form as not to recognize the second mortgage as any valid encumbrance, but to save all questions of priority of right, in the event that it should be regarded as of any validity. And the same course might be pursued in regard to the attachment, if that claim should be insisted upon. That will of course be subject to all the mortgages if it should be regarded as of any force.

(7.) In regard to the right of the commonwealth to finish the road and insist upon holding the prior claim to it to the full extent of all their advances, perhaps nothing more need be said. Upon general principles such advances, made by a mortgagee in possession, by way of permanent erections, would not be a valid claim even as against the mortgagor. But necessary repairs are a valid claim both against the mortgagor and subsequent encumbrancers. And permanent erections made by consent or acquiescence of the mortgagor and subsequent encumbrancers, or while they lie by and do not object to such erections being made, are also a valid prior claim upon the estate. And in one case, where the estate consisted of a building lot, which was unproductive, a dwelling-house, erected at a cost of \$5,000, was held a valid claim on the part of the first mortgagee in possession.²⁵

(8.) And in the present case I should expect a court of equity, if it made any decree in advance, to direct that unless subsequent claimants removed the claim of the commonwealth in some short and reasonable time, to be fixed by the court, they be allowed to proceed and put the road in operation, and hold a prior claim upon all the property, real and personal, for their expenditures in that behalf. And if that course were pursued by the commonwealth, by giving notice to all subsequent claimants, without obtaining any previous order from the court for thus doing, and subsequent claimants should afterwards succeed in establishing a right to redeem from the commonwealth, I should entertain no question they

²⁵ *Montgomery v. Chadwick*, 7 Clarke (Iowa), 114.

would be required to pay all sums advanced by the commonwealth in order to render the property productive.

(9.) I am not aware of any case in this state where the courts have decreed a foreclosure except that of *Shaw v. Norfolk County Railway*,²⁶ and it does not very clearly appear, from the report of that case, how it was finally disposed of by the court. But the court did then decree a foreclosure, and it became absolute, unless it was redeemed by the company. It does not appear that there was more than one mortgage in that case.

STREET RAILWAYS.

The Broadway Railway Company v. The Metropolitan Railway Company.

1. Question of jurisdiction of the subject-matter of controversy.
2. The right of way, where different companies run upon the same track.
3. The mode of estimating compensation, where one street railway company use the track of another company.

As passenger railways now exist in most of the cities and large towns in the country, and the question will often arise in regard to compensation to be paid by one company for the use of the track of another company, we have inserted our report to the Supreme Judicial Court in an important case in Massachusetts, which was acquiesced in by the parties, and made the basis of adjustment between them without an appeal to the court on exceptions. Some other questions are also discussed briefly.

REPORT.

I. The petitioners claimed from the first, and throughout the hearing, that neither the court nor the commissioners had any legitimate jurisdiction of the matters at issue between the parties, and demanded of the commissioners a formal report of our determination upon that question. This exception to the jurisdiction is based mainly upon the terms upon which the Metropolitan Railway Company were, by the city of Boston, allowed to lay their track, so as to complete the circuit (as it is familiarly called), the compensation for the use of which is now in question. This order was obtained in pursuance of the petition of the Metropolitan

²⁶ 5 Gray, 162.

Railway Company, with the consent and concurrence of the Broadway Railway Company, and in consummation of an arrangement between those who represented the respective companies before the legislature, and for the purpose of compromising the controversy then going forward between them, before the legislature, in regard to the right to build and use this circuit.

It was arranged that the Metropolitan Company should take such addition to their charter as was requisite for the purpose, and go forward and obtain the location of their track upon this circuit, and construct the same, with the expectation and understanding between those who thus represented the interests of the two companies, that the Broadway Company would be allowed to run their cars upon the circuit upon such terms as might be agreed upon between the parties, or settled by the proper tribunals, in case of disagreement. Nothing was said at this time by either party, in regard to the subject of toll or compensation to the Metropolitan Company for such use of their track.

Upon the granting of the order by the city government for the location of the track upon this circuit the following condition was annexed to such order: "This location is granted under the further express proviso and condition, that the board of aldermen reserve the right to permit the Middlesex Railway Company and any other horse-railroad company to run cars over the track, so located by authority of this order, for such compensation to be paid to the Metropolitan Railway Company, and upon such terms and conditions as the board of aldermen for the time being shall prescribe."

After the Metropolitan Company had laid their track and completed the circuit, they permitted the Broadway Company to enter upon and use it, without any compensation for the use being agreed upon by the parties, or fixed by the board of aldermen; and without any distinct claim of that kind being made by the Metropolitan Company at the time such use began, except what is to be inferred from the conversation which passed between the agents of the two companies, with reference to the subject just before the use began.

The lessee of the Broadway Company "asked the president of the Metropolitan Company what they were going to charge them?" He said "it was a new thing; wait and see what damage;" "did not know what;" "did not know as it would be any;" and two directors of that company, upon being inquired of upon the sub-

ject, "said the same." "But never told them they could run for nothing;" said "it was a new experiment."

The use of this circuit began on the 5th day of September, 1861, by the Broadway Company, and they were formally notified in February, 1862, that they would be expected to pay for the use, or as the witness said, "to pay damage," "and that some arrangement" (in regard to the subject) "must be fixed." From this and other matters passing between the companies and their agents, both before, at the time, and after such use began, the commissioners are satisfied that it was intended by both parties, at the time, to leave the matter of compensation for future adjustment. The commissioners did not consider that any, or all, the preceding exceptions could have the effect to defeat the general jurisdiction of this court in the matter, and proceeded with the hearing.

II. The petitioners next requested the commissioners to determine the mode of crossing at the intersection of the tracks at Beach Street and Harrison Avenue; and to decide which company shall have the preference in the right of way at such crossing, or which shall wait for the other, when both have cars arriving at the crossing near the same time. It appeared that the Broadway Company had thus far conceded the right of way to the Metropolitan Company upon their own track; and the commissioners consider this to be reasonable and just, and report that it should be continued.

III. The petitioners urged before the commissioners, that some order should be made by them in regard to the conductors of the Metropolitan Company stopping at the office of the company in Tremont Street each trip to settle their fares. It was claimed that there had sometimes been mismanagement and unnecessary delay in regard to this matter. But, at present, the delay on this account has been reduced to one minute or less each trip, which seemed to be as short a time as could fairly be insisted upon, if the thing is to be regarded as allowable.

The commissioners being aware of the embarrassments attending the accountability of persons receiving money in the mode it is received by these conductors, and of the liability of the company to suffer loss, unless the settlements are required to be prompt and frequent, have not been able to devise any scheme in regard to the mode of conducting the same, which they were prepared to recommend as a substitute for the one now practised. And as this

mode of settlement with conductors seems to have been adopted by the company after mature deliberation, and to be regarded by them as indispensable to their reasonable security against loss; and especially as it is now conducted with the view of producing the least possible delay and inconvenience to the other companies using the same track; the commissioners did not feel prepared to recommend its discontinuance, notwithstanding its liability to be so conducted as to produce serious inconvenience to others using the same track, as it was claimed had sometimes been the case. We have come to this conclusion partly upon the ground that, as we view the matter, the rights of the company owning the track are paramount, and should be first secured, as far as they can be, without unreasonable and unjust restraint upon other companies using the same track; and that in cases where there is a necessity that the convenience of one company should give way, and the inconvenience to either company will be nearly equal, it should fall upon other companies rather than upon that which owns the track. We consider that other companies should not be allowed to use the track of the company building and owning it, unless in a manner and to an extent consistent with the reasonable freedom of the latter in the conduct of its own operations. If we are mistaken in this view, and the rights of both companies are precisely equal in all respects, in regard to the use of the track upon this circuit, it is very possible some scheme may be devised whereby this delay may be obviated. If the Metropolitan Company were required to keep this office for settlement with conductors upon some other portions of their track, where the cars of other companies did not run, it is obvious the cause of complaint would be removed. This has occurred to us as the simplest mode of effecting that object; but we have not deemed the inconvenience sufficiently serious to require any order by us at this time.

IV. In regard to the matter of compensation claimed by the Metropolitan Company for the use of their track by the Broadway Company, the views presented by the parties were extremely diverse. We shall only present them to such an extent as to enable the court to pass upon them understandingly.

1. The Broadway Company claimed that there is no compensation to be allowed in such cases, since all persons have equal right to the use of the highway, and may with impunity fit their carriages so as to run upon the rails laid by any other person, natural or

artificial, within the limits and along the line of the highway. This claim was based, a good deal, upon the assumption that the carriages of other horse-railway companies, running upon the track of the Metropolitan Company, injured them far less than the injury resulting from carriages not running upon their track, and less than would result from the Broadway Company carrying their passengers along the same line in omnibuses. The commissioners were satisfied this assumption is altogether well founded, so far as the facts are concerned, but were not prepared to adopt the legal conclusions involved in this view of the case.

2. The Broadway Company claimed that the Metropolitan Company was precluded from all claim for compensation, in this mode, on the ground that under the first location of the Broadway Company, in Summer and Winter Streets, they had the right to enter upon the track of the Metropolitan Company and to use the same, and no compensation for such use could be enforced against them except under some order of the mayor and aldermen of the city. But it being conceded that this location had been vacated by the judgment of the Supreme Judicial Court, and that the Broadway Company had subsequently obtained an amendment of their charter, enabling them to unite with the Metropolitan Company's track, and to use the same, and the compensation for such use, it was expressly provided in such amendment, should be settled in this mode ; and also for other reasons the commissioners were of opinion that this claim was not well founded, and overruled the same.

3. The Metropolitan Company presented their claim for compensation, in many different forms, in order, as far as practicable, to enable the court to pass upon the same understandingly ; and because the matter is now one chiefly of new impression, and where as yet no rule of compensation has been established by the decision of the courts or the usages of business. We shall indicate these claims briefly.

(1.) The Metropolitan Company claimed that in estimating compensation to them for the use of their track by the Broadway Company, the commissioners should ascertain the net profits made by that company during the period in question, and then average it upon the whole track over which their cars passed, and give the Metropolitan Company the proportion earned upon their track, as the just compensation for its use. Upon this mode of estimation they claimed \$8,290.71.

(2.) The Metropolitan Company also claimed that the commissioners should estimate the compensation for such use, by allowing them the net earnings per mile run upon their track by the Broadway Company, which they claimed was seven cents; and should add thereto four cents per mile run upon their track, as the just rate of compensation for ordinary expenses and deterioration, and five cents per mile run for making and repairing pavements, making in all sixteen cents per mile run by the Broadway Company upon the track of the Metropolitan Company, which, as they claimed, would give them \$9,899.36.

(3.) The Metropolitan Company also claimed that the Commissioners should estimate the compensation to them by taking into account the net earnings of the whole line run by the Broadway Company, and divide such net earnings upon the whole line in proportion to the cost of each portion of the road run by the cars of the Broadway Company, adding thereto the expenses incurred by the Metropolitan Company upon this circuit, or the just proportion of such expense which fell to the use of the Broadway Company. Upon this hypothesis they claimed \$12,044.05. These different views will appear more in detail upon the exhibits of the Metropolitan Company, and with slight modifications which we have not stated, and which may be referred to, marked D. No. 10, D. No. 11.

The commissioners were not prepared to adopt and recommend either of the views above stated as urged on the part of the Metropolitan Company, because they did not regard them as based upon any rate of compensation bearing any just proportion, either to the value or to the expense of the use of the track to the respective parties.

4. A good deal of testimony was given on the part of the Metropolitan Company with a view to induce the commissioners to fix some toll or rate of compensation in proportion to the extent of the track used. This was based mainly upon the rent paid different horse-railroad companies, leading into Boston, by the lessees. But the commissioners were not satisfied that any essential aid in estimating this compensation could be derived from this source. The rent paid by the lessees of horse-railroad companies is usually a gross sum for a given extent of track. The rate of such rent is liable to be affected by so many and important considerations peculiar to each line of roads, that it seemed impossible to make

the rent paid upon one road much guide for any other. It is possible that in the course of years some approximation towards an ordinary rent per mile of track, or per mile run, may be arrived at. But it is very obvious nothing of the kind has yet been attained, and it seems to us very questionable whether it ever can be.

5. The Metropolitan Company attempted to show, from the analogies in regard to the use of the tracks of steam railways, by other companies, and the rates of compensation, some data which might aid the commissioners in arriving at a correct estimate of compensation in the present case. But the commissioners failed to perceive any satisfactory ground whereby these analogies could be made to apply to the present case. The motive power upon steam railways being such that it requires, for safety and success, to be under the control of a single agency, it does not admit of allowing such companies, to any great extent, to run their engines and cars over other lines than their own. Hence, where passengers or freight are carried by one road for other connecting lines, it is done, most commonly, by means of their own motive power, and an allowance is made for the use of cars, and conductors in some instances, and for patronage possibly. But the rate is seldom fixed for the use of the track alone. It is more commonly determined by a division of fare and freight, in such proportion as shall seem just in the particular case, and with reference to circumstances, many of which are not of general application to other cases, so that very little aid is to be obtained often, even in regard to a case upon steam railways, from the rule adopted in others, much less in regard to the rate of compensation for the use of the track of street railways.

The commissioners, after a good deal of time spent in the hearing, and a very careful examination of all the testimony given before us, and of all the views presented by the parties and their counsel, came to the conclusion that the proper mode of estimating compensation in this case, was to ascertain the cost of the track used, and of superintendence; the expense of the repairs and tending, and the probable deterioration, and the expense of clearing track, and the extent of use, and to require all parties concerned in such use to contribute ratably towards the expense of maintaining such track.

We had no doubt the company building the track must be re-

garded as having a property in it. And although it may not be a matter altogether free from embarrassment, to give a satisfactory definition of the precise nature of the rights and interest of such company in their track in all respects, it is nevertheless clear to the minds of the commissioners, from the decisions already made in this commonwealth, and in other states, that such track must be regarded as in the nature of private property, and that it cannot be fairly considered, as in any just sense, devoted by the makers to public uses. Hence we do not understand that it is competent for any person, natural or corporate, at his mere will, to appropriate the track of a horse-railway company to his own private use and convenience, by adapting his carriage to such use for that purpose; if that were established it would go far towards the recognition of the claim of the Broadway Company, that no compensation could justly be awarded by the commissioners in the present case. But the commissioners regard the track and its accessories, although laid in the public highway, as constituting an important estate in the company to which it belongs. And where it is built or maintained for the convenience and use of two or more companies, it is obvious, as it seems to us, that no more simple, natural, or just mode of estimating compensation for its use can be suggested than to divide the expense necessarily incurred in its maintenance and use, according to the use.

In the present case we have found some difficulty in determining the necessary expense of maintaining this circuit in such a manner as to make it altogether satisfactory to our own minds. The principal difficulty has arisen in regard to the expense incurred by the Metropolitan Company in complying with the conditions annexed by the city government to the location of their track in this circuit in regard to paving and improving the streets through which it passes. This company were by these conditions required to pave the entire street for long distances, and to contribute large sums towards the expense of widening streets, and the company were compelled to comply with such conditions, without questioning either their legality or their reasonableness, since the municipal authorities unquestionably had an absolute and irresponsible discretion in regard to the terms upon which they would suffer the track to be laid or continued in such streets, and it was not therefore material to inquire how far their requirements were legal or not, as they could at any moment require the track to be removed

unless all the conditions they saw fit to name were strictly and promptly complied with.

But it was claimed by the Broadway Company that these requirements were a kind of official extortion, which being wholly without warrant of law, could not justly be taken into the account of the legitimate expense of maintaining the track of this circuit. But the commissioners were not sufficiently satisfied of this to feel justified in excluding it from the estimate of the cost of maintaining the track in this circuit. And whatever might be thought of its entire legality, there could be but one opinion in regard to its necessity, since no tribunal could possibly control the action of the municipal authorities in regard to the subject.

There can be no doubt that such arbitrary exactions are very liable to abuse, and are therefore naturally calculated to excite in the public mind the suspicion of such abuse. And where a railway company is allowed to lay its track in the street, upon the condition of assuming the burden of paving the entire street as far as the track extends, or for large portions of it, and of paying large sums towards the improvement of the streets, by widening or otherwise, through which the track runs, it has no doubt somewhat the appearance of going beyond the mere remedying the inconvenience caused by its own works, and some views may be taken in regard to it which give it the appearance of being the price of the grant. But courts and their instruments are bound, we suppose, to view such transactions, with a charitable disposition to maintain and justify them upon allowable grounds. And in this view it seemed to the commissioners that there was no satisfactory proof in the case that these burdens were not imposed in good faith, and that they might not justly be regarded as rendered necessary, in some sense, and to some extent, in consequence of the privilege granted to these companies to use their cars through these streets.

And as it was certainly a burden which the Metropolitan Company could not escape, as before stated; and as the privilege accorded to these companies is one of a very burdensome and offensive character, so far as other public travel is concerned; and one which would not be likely to meet with much indulgence from the public, if it were not for the very great accommodation thus afforded to a class of persons who do not use the public streets, with carriages, to any great extent in other modes, it seemed to us

that the companies using this circuit could not justly require to be exempted from their proportionate contribution towards this expense. And the last consideration adverted to might justly seem to require the city authorities to be watchful that such privileges were not given these companies except upon the condition that they indemnify fully against all expense fairly attributable, either directly or indirectly, to their peculiar use of the street. And so far as it may fairly be considered doubtful whether the burdens imposed upon the Metropolitan Company are not fair and legitimate, the commissioners are bound to regard them as being so. We have therefore included this expenditure in the estimate of the cost of the track along this circuit, and have taken the expense of maintaining the pavement into account, in estimating the expense of maintaining the track.

We call the cost of building the track in this circuit, according to the requirements of the charter	\$21,000 00
Expense of paving and other business imposed	24,047 96
Cost of curves and engineering	1,150 00
	<hr/>
	\$46,197 96
Interest upon capital thus invested	\$2,770 97
Snow expenses, by estimation	1,200 00
Repairs of track	750 00
Depreciation of track	750 00
Repairs and deterioration of paving	2,000 00
Policeman, trackman, and guarder, and contingent expenses of tending track	1,500 00
Allowance to company for general supervision, including proportion of salaries, law expenses, and other matters not susceptible of clear definition, but which will inevitably occur in numerous ways	3,000 00
	<hr/>
	\$11,970 97

One-fifth of this sum, we think, should be paid by the Broadway Company annually to the Metropolitan Company, beginning from the date of the petition in this case, \$2,394.19. And if the commissioners have any jurisdiction to determine the rate of compensation before the date of the petition, which from a hasty examination would not seem to be the case, we should fix the same rate of compensation in proportion to the time from the first entry of the Broadway Company upon the track of the Metropolitan Company, which was on the 15th day of September, 1861.

We have allowed nothing for counsel fees in estimating the cost of this circuit, because we regarded such expense as chiefly the result of the controversy between the companies, and presume that similar expenses were incurred by both companies, and after the controversy had been compromised by mutual concessions, we judged it to be fairly within the spirit of the compromise that the expenses of the controversy should not be brought into the future dealings of the parties, but should set off against each other.

Some claim was made by the Metropolitan Company on account of their greater exposure to claims for damages occurring along this circuit to persons or their vehicles, in consequence of the streets being more crowded by the frequent passing of teams, resulting from the use of the track here by so many companies. But the commissioners did not make any separate allowance on this account, because it was extremely difficult of estimation, and did not seem to rest upon any sufficient legal basis. For if injuries complained of resulted from the negligence of one company or the other, or their servants, it should fall, and must fall, if the claim were enforced by legal steps, upon the company in default. And if such claims were not founded upon any legal default of any party, they could not be regarded as legal claims, and the settlement of them being a voluntary payment in order to buy peace, could not form the basis of a legal claim against any one. But the commissioners had no doubt the Metropolitan Company would be presented with some claims of this character every year, which they might choose to pay rather than contest them, and which it might be prudent to meet in this mode, and that the expense thus incurred might be increased to some extent by reason of the use of this circuit by so many companies. We could only meet this, if in any mode, by a pretty liberal compensation for general supervision, which we have allowed. In this we thought it just to take into account the fact that the company owning the line, used in common by other lines, necessarily must be subjected to many outgoes, not fairly attributable to any specific duty, or breach of duty, and which nevertheless must be met, and should be compensated in some way by those who have the common use, and consequently contribute their share in bringing those outgoes upon the primary company.

The commissioners had under consideration the question of the diversion of passengers from the Metropolitan Company by the

Broadway Company being allowed to run their cars upon this circuit, and which passengers would otherwise naturally go upon the Metropolitan Company's cars. We had no doubt such diversion took place to a considerable extent. But we were not prepared to say that the Metropolitan Company could require the loss thus sustained to be included in the estimate of compensation for the use of their track. We thought it could not be thus included, and if we were wrong in our view, there should be added to the estimated compensation at least \$300 annually. The commissioners considered that the Broadway Company had acquired the legal right to take up and carry passengers from any one point to any other point upon their whole route, including this circuit.

This view of the case suggested to the commissioners in ordinary cases, where one company is allowed to drive its carriages over the track of another company by means of its own motive power, whether upon steam or horse railways, the necessity of providing against any diversion of the natural and legitimate business of the company owning the track. This is effected more readily upon steam than upon horse railways; and the company exposed to loss has a more obvious check upon the other. In the case of horse railways, where passengers are taken up and set down at every point upon the line, and where the public accommodation would seem to require that every company passing along the line should be allowed to do this, it will be more difficult to keep the amount, and the company exposed to loss has no natural check upon the other.

The commissioners suppose it was not the intention of the legislature to allow foreign companies entering upon the track of those companies owning and maintaining it, to divert the business primarily and legitimately belonging to such company.

But as the circuit in question seems to be the natural outlet of a considerable number of horse-railroad companies centring in Boston, and the use of it seems necessary to enable such companies to accomplish satisfactorily the proper business for which they were incorporated, the commissioners regarded it more in the nature of an investment for the common benefit of all these companies, than in ordinary cases. In the common case of one company being allowed to run its cars over the road of another, it would seem requisite, in order to effect perfect justice between them, that the company owning the track should be indemnified

for any diversion of its own legitimate business; and we submit whether or no it should be so in the present case.

In *Metropolitan Railw. v. Quincy Railw.*, 12 Allen, 262, it was held where one street railway, being duly authorized, had entered upon and used the tracks of another company, that the commissioners appointed to determine the rate of compensation and the manner of use and connection, may prescribe a rate of compensation founded upon the amount of business of the first corporation over the tracks of the second, and for that purpose may require accounts to be kept, and to be open to inspection by the other party.

We have thought that the increasing interest in street railways would justify the insertion at this place of a large portion of our carefully prepared report to the Legislature of Massachusetts on that subject.

REPORT.

The subjects of the commission discussed in detail.

1. Until perfection is reached, the exact relations of the municipalities and street railways cannot be strictly defined. Scope is required for development and growth.
2. We do not regard the interests of towns and cities as opposed to that of street railways.
3. Caution required to be used in regard to concessions of public right.
4. Reserve in regard to concessions to private interests of great magnitude and success, excusable. This may be done, in excess. Primary control of streets, and ultimate control, if practicable, should remain with municipalities.
5. Relations of street railways to each other, and to the use of streets by other vehicles, &c.
 - (1.) Rule of compensation where one road uses the track of another, without doing any competing business.
 - (2.) The best mode of accommodating other travel to street railways.
 - (3.) The gauge of street railways and other carriages, should be the same.
 - (4.) Paving street and three feet on each side, fully indemnifies the cities and towns, in ordinary cases.
 - (5.) Railways should not be allowed in street, unless room for two tracks, and for carriages to stand, and others pass on either side.
 - (6.) Street railways should be restricted within these reasonable limits, in laying new tracks. Improvements suggested in Boston.
6. Further discussion of the use of tracks by different companies.
 - (1.) Branch lines should account for the net profits of all business done by them exclusively upon the trunk line.
 - (2.) To exclude the branch line from the trunk might put it too much in the power of the latter.
 - (3.) Not practicable to require trunk roads to draw the cars of branch lines over their own road, in all cases.

- (4.) The rights of trunk and branch lines, upon sound principles of construction.
- ⁷¹₁₂ (5.) The mode of estimating compensation in such cases, recommended by us, will cure the desire to multiply trips.
- 7. The relations of street railways to other travel, further discussed.
- 8. The propriety of consolidating street railways in Boston, discussed and doubted.
- 9. Omnibuses cannot, properly, be excluded from streets where street cars are allowed.
- 10. The subject of removing ice and snow from the streets discussed.
- 11. The motive power of street railways. Dummy engines.
 - (1.) The examination of these engines. Their use not fully tested.
 - (2.) They will be exceedingly useful in rural and suburban districts.
 - (3.) They occupy but small space, ascend steep grades with ease, and possess great power.
 - (4.) They will be likely to come into general use in light and short passenger traffic, both on steam and street railways.
- 12. Commutation tickets. Best regulated by the companies. Change recommended.

We shall now give our views upon all the subjects submitted to our consideration, in the Resolve providing for our appointment, in the order in which they occur in the Resolve.

1. In regard to "the relation of street railways to the cities and towns in which the same are located" very much may be said; and at the same time it has not appeared to us judicious to attempt to define these relations, and the consequent rights and obligations, with much strictness, by any new legislative provisions. It has become an axiom in regard to all the intimate relations of life and business, that in proportion to the closeness of the relation was the demand for flexibility and expansiveness in the rules, or laws, under which the relation was attempted to be maintained, if we would secure reasonable freedom and comfort in the continuance of the relation; and especially where we intend to give room and scope for development and growth in the future. When we feel sure that any system has reached the point of perfection, so that there is no further demand for space for development or growth, it will be practicable to define the obligations and duties of the related parties with perfect accuracy; but, until that point is reached, there will be large demand for modification and experiment, and this will always require latitude and liberality in the terms and in the construction of the laws which we apply to the subject.

2. It was very much urged upon our consideration by the different railway companies which came before us, that some mode

should be devised for making the street railways in some degree independent of the exactions and control of the cities and towns through which they passed. There seemed to be a feeling as if the municipal authorities had an interest, in some sense, antagonistic to that of the street railways within their limits; so that when the interests of the latter were submitted to the judgment of the former, it was equivalent to being tried by an adversary party. We have no question that this feeling is very sincerely entertained by many of the officers of the street-railway companies, and there may have been more or less reason for the feeling in the past relations and experiences of these two interests, since all such matters are more likely to assume the form of antagonism, in the incipient stages of the growth of a new enterprise, than after its form and demands have become more fully developed, and consequently better understood. But we have not been able to comprehend why the municipal boards of the towns and cities stand in any position of interest opposed to street railways, more than to any other, as extensive and important interests within their limits.

3. It is undoubtedly true that the more exclusive the interest and occupancy which any class of carriages shall require or demand in the streets, the more needful it will become, and the more natural, that those who have the charge of repairing and clearing the streets should exercise watchfulness and circumspection, lest encroachments should imperceptibly be suffered to grow up in regard to other travel. So also the larger and more influential an interest becomes, and the greater number of persons who are interested in its continuance and extension, the more difficult it will be to retrace any step of indulgence once conceded to such interest; and consequently there will exist the greater need of caution in regard to making concessions to it, lest acquiescence and forbearance, which were intended as mere courtesies or accommodation at first, might subsequently be urged as the basis of rights. Hence the municipal authorities may sometimes feel compelled, no doubt, to exercise a more rigorous oversight, and a more minute inspection and pertinacious spirit of insisting, in regard to small matters, in the use of the streets by railways, than in regard to any other mode of use.

4. And we suppose it is too well understood to require repetition here, that all private interests become more and more aggres-

sive upon public interests in proportion to the magnitude and success of such interests; and hence the municipalities, without intending any unjust discrimination, may very naturally have manifested extraordinary reluctance to yield to the demands of the street-railway companies; and in granting them locations and other necessary privileges in the streets, they may have attached such limitations and conditions as seemed to the companies unreasonably onerous, without really having intended any injustice. And we are bound also to say, both from the testimony before us and the common experience upon the subject, that there have no doubt occurred some instances where unjust and unreasonable exactions have been made upon these railway companies by way of exorbitant services in return for grants, which, if not exactly matter of course, and to be conceded without limitation or reserve, should certainly have been conceded upon much more favorable terms, if conceded at all. And from what we have seen and learned, in regard to matters of this character, we should expect that such instances of abuse would be likely to occur occasionally in the future; as it is matter of common experience with the majority of men, and especially those who are in positions, where the favorable opinion of the multitude is in the nature of an estate, very valuable and desirable to be secured, that there will be much less anxiety about giving offence or the color of complaint to any person, natural or corporate, which is not in condition to retaliate the affront, than if it were otherwise. Hence we have included among the additional legislative provisions which we have recommended, such safeguards against all such possible abuse as seemed to us most likely to secure the street-railway companies in the future against all injustice, without intending to restrict the primary control of the municipal authorities over the streets and highways within their limits. This primary control of the use of the streets and highways by every species of vehicle, seems to us altogether indispensable in the municipal authorities, in order to secure the efficient administration of the police in such places; and it has also appeared to us, that it would be liable to create too much embarrassment and delay in such administration, if appeals were allowed in every instance from any order made by the municipal authority upon such street railways. We have endeavored to preserve the proper medium.

5. "The relations of street railways to each other, and to the

use of the streets by ordinary vehicles, and the whole matter of the conveyance of passengers through the streets by horse-cars and omnibuses," form the next department of our commission; and this it will be convenient to consider under separate divisions.

(1.) "The relations of connecting street railways to each other." This is an important, and, as it has seemed to us, a somewhat difficult problem. There is no great difficulty in regard to street railways converging to a common centre, and where there is no direct competition in the different lines of travel towards that central point. In such cases where it becomes necessary or convenient, in order to reach the common centre of traffic, for one company to use the track of another company for a greater or less distance, within such limits as not to create a competing business, it should always be granted by the legislature upon condition of making reasonable compensation. The obvious rule of equitable compensation in all such cases seems to be the payment of interest upon a portion of the capital invested in the track proportionable to the use, and a proportional part of the expense of supervision and repair, and of the deterioration of the same. This seems to us more just, and more strictly following out the analogies of the property and the public rights than either of the other possible rates of compensation; *i. e.*, by paying a sum equal to the injury done the track by the use, or by paying according to the benefit derived from the use.

(2.) We come to this conclusion because we regard street-railway tracks, by whomsoever built, as in the nature of a common highway. And although the first company to whom such a grant is made by the legislative authority unquestionably acquires a franchise of a corporate character in this mode of transportation, and an exclusive franchise to some extent, this exclusive franchise only extends to the use of the tracks in this precise manner; *i. e.*, for transporting passengers in cars for hire or toll. It seems certain that such grants are not intended to exclude ordinary vehicles from using the rails longitudinally for the purpose of passage, or to exclude ordinary vehicles from being so made or altered as to conform to the gauge of the tracks, so as to run the wheels of such carriages upon the tram of the rails. In some of the cities in other states the gauge of the street railways was originally fixed at such a width as to invite the ordinary travel in carriages into the same lines with the cars used by the company. And

where the streets are of sufficient width to allow of two railway tracks, and it becomes necessary to allow a railway to occupy such street at all, it would unquestionably conduce very much to the quiet and good order of the travel in such street to invite all the travel, in each direction, into a single current upon each of the tracks of the railway, in the same direction as the cars pass. This is done by force of city ordinances in some of the cities, and is found very useful; and in some of the states it is effected by special statute.

(3.) This brings up the question of the gauge of street railways as compared with the width of ordinary carriages. And it seems to us that if the question were new it could not fail to meet the approbation of all, to require the gauge of street railways to conform to that of ordinary carriages, as has been done in some states. But this would now be impracticable in this commonwealth without great loss and expense to the companies whose tracks are laid. Carriages may be conformed to the railway gauge, but that might be a detriment to the carriages. We must probably now be content to let it follow the natural course of interest and convenience. We have not embraced in the bill reported by us any provision upon the subject. But wherever the carriages and railways in the streets can be brought to the same gauge, and two tracks instead of one be laid in the same street, we should regard it as the most judicious arrangement which could be made for the accommodation of street railways. Under such an arrangement it does not seem to us that the street railways, by maintaining that portion of the street covered by their tracks and a reasonable distance on either side, three feet perhaps, could prove much detriment to the streets. It has appeared to us that, under such an arrangement, they would be likely to prove more a benefit than a burden to the cities and towns where they exist. The bill reported embraces a provision of this character.

(4.) And we have no question that, where a single track is laid in a street of sufficient width to allow of carriages passing on either side, without coming so near the curb-stones as to interfere with carriages remaining stationary along the sidewalks, the obstruction would be but slight, unless the street was very much thronged. In such cases it is probable the paving of the portion of the street occupied by the track, and three feet on each side, would be a full compensation for the privilege, and might even

leave the municipalities in better pecuniary condition than if no such track had been laid.

(5.) We have been forcibly impressed with the absurdity of allowing a railway track in a street, so narrow, that there is not sufficient room for a carriage upon either side to stand comfortably, which is sometimes done, as was shown before us. And we have felt, that where it could be done, the street-railway tracks, in the cities and populous towns, should be restricted to those streets which are of sufficient width to allow of two tracks, in the manner already explained; and that no railway track should be allowed in any street not of sufficient width to allow the passage of carriages upon either side, without interfering with carriages standing near the sidewalks; or if allowed, it should only be done as matter of strict necessity, and to the least possible extent.

(6.) If the tracks of street railways are restricted within these reasonable limits, it does not appear to us that they will produce any such obstruction to the orderly progress of other travel, as to become a just occasion of complaint. But where they are allowed in streets narrower than already intimated, we feel confident they must prove a considerable obstruction to other travel. And while we deem it expedient to leave the primary power of location with the municipal authority, and without restriction, we should certainly regret to see street railways laid in the crowded and narrow thoroughfares of any of the towns or cities of the commonwealth. We believe that if the railway tracks and the omnibus lines could be removed from the lower end of Washington Street, in the city of Boston, it would prove a great convenience and comfort to the other travel there, both in carriages and on foot. We are not able to say that this is now practicable, without too serious an embarrassment in regard to street railway and omnibus travel. But if the thing had been considered early enough, we believe it might have been effected, without any such inconvenience to that travel as ought to be regarded as any ground of complaint. It seems to us better that such public modes of conveyance should be kept out of the most crowded thoroughfares, and especially the street railways, which cannot be made to pass except upon an inflexible line. It ought not, and need not be regarded, as any just ground of complaint, that passengers cannot always be taken up and set down, at the precise point where they most desire it. There must be some limitation upon these public accommodations, by way of

passenger transportation, short of the wishes of those most nearly concerned, or it would compel the surrender of the entire streets, and all the travelling transportation, to this particular species, which of course will not be expected. These things must be made to accommodate themselves to existing necessities, and it need not be required, to push a railway car into the most public places of concourse, in order to tempt passengers to embark upon it. If the railway is of substantial accommodation to an important course of travel, and its line passes within reasonable distance of the ultimate destination of such travel, there need be no anxiety about securing all the travel which really demands any such accommodation. And we believe the great anxiety to push the lines of street railways into the very centres of public concourse, arises a good deal from an apprehension of competition, either from omnibuses, or other railways, unless that is done. But the conveniences and comfort of omnibus travelling are not such as to operate as a serious competition against the far greater comforts and conveniences of street railways, except in particular cases, and to a very limited extent, and where, for some reason, they are able to give a special advantage in some other particular.

6. "The relation of connecting street railways to each other," has been anticipated, so far as different lines converge to a common centre, and where one road desires to use the track of another company only to the extent of reaching that centre with its own traffic, without doing, in any sense or to any extent, a competing business. Beyond this, it is rather a perplexing problem to define with clearness and certainty the best rule for the use of one railway company's track by another company. It seems to be indispensable to allow the traffic of one company to pass over the track of all intervening roads in order to reach its ultimate and legitimate destination. If this were not done, it would leave the traffic of the branch roads so entirely at the mercy of the trunk lines, as to give them the power, and the motive, to make an unequal discrimination in their own favor. And to such an extent would this be liable, and likely, to be carried, that it must seriously, if not fatally, affect the interests of such branch lines. So that all the witnesses before us, in the interests of branch railways, concurred in the opinion that the right to run their cars upon the track of the trunk roads was indispensable to the reasonable security of their rights. But this necessity only extends to the transporting

of such passengers as these branch roads take up or set down upon their own lines, and would not naturally extend to that portion of the traffic which is strictly limited to the trunk line; *i. e.*, where it begins and ends upon that line. We think that traffic which comes so near the line of the trunk as to be attracted to it, without the existence of the branch; but which nevertheless comes upon the branch before it reaches the trunk, and also that which goes from the trunk line, but is destined to points beyond the trunk, and upon the branch, must be regarded as the legitimate traffic of the branch, and which it may properly transport upon the trunk, without incurring the imputation of carrying on a competing business. To this extent we have already indicated our views in regard to the propriety of allowing the branch lines to use the trunk lines, and the basis upon which compensation should be allowed for such use.

(1.) But beyond this we have found it difficult to define with exact precision any general rule. It is certain that no branch line should be granted or built, where it is expected to maintain itself, to any considerable extent, by the profits arising from the traffic on the trunk road. The doing of such business is a matter wholly incidental to, and not to be taken into the account, in determining the necessity or propriety of creating a branch railway. All the traffic upon the trunk, both from the fair construction of the grant, and the nature of the case, legitimately belongs to the trunk line, unless, as before stated, it either comes from, or is destined to, some point upon the branch. As to all the traffic which begins and ends upon the trunk, the branch is an intruder when it attempts to engross it, or indeed to do any part of it, with any view to profit. So far as this portion of the traffic is concerned, the branch roads should account to the company owning the trunk line, for all net profits above the fair cost of transportation. And we have recommended a provision to that effect.

(2.) It was made a question before us, whether one street railway should ever be allowed to run its cars over the track of another company, where a competing business existed to any considerable extent, and it was attempted to be likened to the case of one steam railway driving its engines and cars over the track of another company, which is now prohibited by statute in this commonwealth. But the cases are by no means similar. There is no such danger of injury to the passengers, and there is no such claim to

exclusive property and use of the track, as in the case of steam railways.

(3.) We have no doubt that the business of one street railway which required to pass over the line of another company, might be sufficiently accommodated, by allowing the latter company to attach its own motive power to the car of the first company, and thus draw it over, performing such traffic upon its own road as it could conveniently do, at the same time. And we have not been able to perceive any good reason why the traffic upon branch lines may not, ordinarily, be sufficiently accommodated in this manner. But as the rates of compensation in that mode of effecting the object would be very difficult to fix, either with reference to distance or number of passengers, or the use of such car for other passengers, thus necessitating an agreement of the parties or a reference to commissioners, we have deemed it more just and prudent to leave the matter open. Unless some statute law could be enacted containing such specific provisions as to obviate the necessity of any arrangement between the parties, or reference to commissioners, it has seemed to us that it would be leaving the parties in a more equal relation, and with more prospect of an amicable arrangement among themselves, without calling in the assistance of commissioners, not to restrict them to a single mode of passage over the trunk road, but to leave both modes open.

There is no doubt a liability to very serious embarrassment, where two lines are allowed to do a competing business upon the same track. We have reflected upon some expedient to cure, or relieve, this evil. It might be done by prohibiting the company, entering upon the line of another company, from taking up passengers not intended to pass over any portion of their own line; but this would produce more or less embarrassment among those who might desire to become passengers, without understanding precisely the class of cars to which they legitimately belonged. And this embarrassment would be likely to exist, continually, to some extent.

(4.) It is claimed, by those interested, in different directions, upon this question: first, that when the legislature grant to one street-railway company the right to run upon the track of another company, there is no implication of the right to transport passengers, whose transit begins and ends upon the latter company's track; and, secondly, that they may do any portion of the busi-

ness upon the track of the second company, the same as if they owned the track. It has seemed to us that the grant to one street railway company to run upon the track of another company, must imply the right to carry all passengers who choose to embark upon its cars; but, as we have before said, we cannot regard the traffic which is limited exclusively to the trunk line as legitimately belonging to the branch company, for their own advantage. We think the net profits of such business, as before stated, legitimately belong to the company owning the track. This distinction may seem nice to some, and so is the whole subject. And we have not been able to find any other scheme whereby the public convenience and the rights of the parties can be properly accommodated to each other. For it cannot be expected that, if the branch road is allowed to take passengers at all upon the line of the trunk road, it should be required to discriminate between such as desire to pass beyond the limits of the trunk road, and which will therefore legitimately belong to them, and such as do not desire to so pass beyond the extent of the trunk road, and which therefore does not legitimately belong to them. And we cannot believe there can be any fair question but the branch line may and should be permitted to take up all passengers intended to pass over any portion of their own route, although coming from the line of the other company. And if so, they must either take all who desire to come upon their cars, or else they must ascertain the extent of their proposed transit, before they allow them to come upon their cars, which would be a somewhat embarrassing mode of conducting the traffic upon street railways, and one which it would not be reasonable to adopt, as matter of construction merely. If then we allow the branch companies, having grants for passing over the trunk company's line, to do the business legitimately belonging to the latter company, in order to afford reasonable accommodation to the public, and so as not to produce confusion in the manner of conducting the traffic, we should nevertheless secure to the trunk road the net profits of their own legitimate traffic, as seems to us most unquestionable.

(5.) It has been suggested by some, that where a branch line is permitted to carry its traffic over the trunk road, thus necessitating a certain number of trips daily, for the accommodation of the long travel, and enabling the branch road to perform without embarrassment a portion of the local traffic upon the trunk road, that the

frequency of the trips run by the trunk road might, and should, be proportionally diminished. We have no doubt something of this kind might be advantageously done, in such cases, and that it would become the general mode of transacting the business upon the line, and be for the mutual interest and accommodation of all parties concerned, if the mode of compensation for the use of the track were required to be estimated upon the basis hereinbefore indicated. Upon any other basis of estimating such compensation we should fear that in running cars of different companies over the same tracks, upon a route sufficiently extensive to create a competing business, there would always grow up a perplexing state of conflict. That was certainly the result of the testimony before us; but we believe the provisions recommended by us in regard to compensation would cure this evil to a great extent.

7. The relations of street railways "to the use of the streets by ordinary vehicles" has been already sufficiently discussed perhaps. It is certain that street railways have become so much a necessity that they must be continued; and although we believe they do produce a considerable obstruction to the comfortable passage of other vehicles in the streets, and especially where such streets are narrow and very much thronged, we nevertheless cannot believe that any wiser or safer course can be adopted than that hitherto in operation, of leaving it to the municipal boards to regulate and accommodate the matter as they best can. In the testimony given before us it was indeed stated by one gentleman, that in consequence of the great facilities offered by the street railways for cheap and comfortable transportation of passengers, many persons are induced to ride to their own detriment, and when it would be far better for them to walk than to ride free of charge, and we have no doubt this may be true, to some extent. But that is certainly not true of the largest proportion of the passenger traffic upon street railways. They are unquestionably, in the main, a very great convenience and accommodation to large masses of people of the middling classes, in respect of property, and which could not be afforded to the same extent in any other mode, and we know of no process of eliminating the evil from the good, any more in regard to this subject than many others. But we think the legislature, and the municipal authorities, cannot be too cautious in regard to multiplying these grants, or locations, where they are intended to accommodate substantially the same business already provided for.

There is always, in such matters, a certain reasonable limit, beyond which competition leads both to the destruction of the competing interests, and the neglect and disregard of public accommodation, and which should by all means be avoided. The number of vehicles passing at different points in Boston, and the proportion of which are cars and omnibuses, will appear in the table appended to this Report.

8. And this leads us to advert to another question which was considerably pressed upon our consideration, — that of encouraging the consolidation of all, or nearly all, the street railways leading into Boston. This is a subject upon which a good deal may be said, with reason and justice, upon both sides, and we are not prepared to say that any certain and infallible rule can be laid down in regard to it. As a general rule, in railway enterprises of magnitude, the more interests can be combined the better, both for the public and the companies, both interests being nearly identical. But this proposition can only be admitted with this qualification, that the conduct and management of the traffic should be suitably restrained by legislative safeguards. There is always more danger of an overgrown monopoly becoming dangerous to other interests of a rival character, just in proportion to its magnitude, and the absorbing and overwhelming nature of its influence upon the other vital forces of society. And this is said without intending to impute any lower or different motives, as the governing principle of action, in such extensive combinations of power, than in those of more moderate proportions ; all that is meant is, that dangerous tendencies commonly increase in the compound ratio of their magnitude and continuance.

It is sometimes observed, too, that such combinations of power in the seat of a great metropolis, where the other agencies of social and civil life and progress naturally centre, are more dangerous, and more insidious, in their overshadowing influence, than where it is more extended in its range, and consequently more liable to be checked and interrupted by counter or conflicting interests and influences. From all these considerations, and others which we have no time to name, we conclude, that while in the infancy of such enterprises there will generally be too much of a tendency to minute subdivision of conflicting interests, there commonly grows up, as they become popular and permanent, too great a tendency towards consolidation. This seems to us more objectionable in

regard to street railways, whose property is attached to the easement of the public highway, than in those public works whose franchise attaches to an easement vested in the grantees. In New York, Brooklyn, and Philadelphia the street-railway companies are very numerous; and, in most respects, we regard this as more desirable, in regard to street railways, than too extensive consolidation.

9. The general power in our commission to examine "into the whole matter of the conveyance of passengers through the streets by horse-cars and omnibuses," will embrace a question raised by the counsel before us, whether we might not with propriety recommend the exclusion of omnibuses from all the streets where railway tracks were laid. If this were done, by a legislative enactment, it might become difficult to satisfy the carriers by these different modes of conveyance, in regard to the streets which each should occupy; and thus be liable to lead to constant bickering and contention upon the subject. It would undoubtedly be wise, if practicable, to exclude both these classes of vehicles from the most crowded thoroughfares, unless they were of such width as to accommodate all the travel without obstruction or confusion. But the omnibuses, while they injure the streets more than any other class of vehicles, being of great weight and driven with considerable rapidity, do not obstruct the other travel in narrow and crowded streets so much as the horse-cars, for reasons already indicated. It would, therefore, be an invidious and unjust discrimination, to exclude the omnibuses from the streets most frequented by passengers, while the cars were allowed to pass there. It seems to us impossible to define, by legislation, any general rule upon the subject. We think it should be left to the discretion of the municipal authorities.

10. In regard to "the manner of using street-railway tracks in the winter," and clearing them of ice and snow, we have not deemed it important, or safe, to recommend any additional legislative provisions. That is a subject, where prompt action and summary powers, in the municipal boards, are more indispensable than in regard to any other matter connected with the subject. And although there is some liability to have the companies visited with hasty and injudicious orders in this respect, thus exposing them to considerable inconvenience and loss, at times, and possibly, in some cases, to a needless extent; it did not appear to us

that there could be much temptation in such cases to exercise bad faith or injustice towards the railway companies, by the municipal boards; and as the interest involved is not one of great magnitude, and we could not obtain much confidence that any legislative provision, or any other recommendation from us, could be of much avail towards remedying any possible evils which might arise in the case, we deemed it wise to leave the matter as it is.

There was some testimony before us tending to show, that in some cases, the municipal boards had permitted the railway companies to have the entire duty of removing the ice and snow from the street, so that it did not interfere with the travel in ordinary vehicles, and that this had proved useful to the public and economical to the companies. And it seemed to us not improbable that some such arrangement might be advantageously adopted in many instances, and that it ultimately would be, if found the most beneficial which could be devised. We think this matter, like many others of a kindred character, will be likely, ultimately, to regulate itself, by the exercise of judicious supervision on the part of the municipal boards, in a much better manner than it can be done by specific legislative provisions, until at least there has been time for more perfect experience, in order to reach the best modes of action.

11. In regard to "the motive power to be employed," we have before intimated, that we had extensive opportunities, during our visit in New York, Philadelphia, and other places, to witness the operation of steam as a motive power, in what are called the dummy engines, upon street railways. We should not probably satisfy the desires or expectations of those most nearly concerned, unless we gave our views upon the subject more in detail than what would seem necessary, out of regard merely to the limited extent of the specific recommendations ultimately made by us, upon this particular question.

(1.) We examined the operation of one of these engines in New York, and one in Philadelphia, and one in Hoboken, New Jersey, and rode after each of them for considerable distances, and we received a good deal of testimony upon the subject from reliable sources. This kind of motive power is now in operation in the immediate vicinity of Boston, and we need not describe the mode of its operation in detail. It is unquestionably a somewhat more economical means of locomotion than that of horse-power, and we make no

question that it will ultimately come into very extensive use in various ways. The thing is, at present, somewhat in its infancy, although invented some years since by Mr. Long, the patentee, who is an ingenious, learned, and experienced machinist, having maintained with universal acceptance a high position in the engineer corps attached to the navy, and who has expended much time and labor in bringing the machine now in use to the greatest attainable perfection. But it would not be wonderful if still greater advance should be made in that direction, and perhaps, ultimately, of such a character as greatly to affect the extent of the use of the present heavy locomotive engines upon steam railways.

(2.) It has seemed to us most unquestionable, that these dummy engines would very soon be brought into general use upon the street railways in rural and suburban districts. They seemed, upon repeated experiments in stopping and starting, to be even more completely under the easy control of the engineer than an ordinary two-horse team is under that of the driver. There would be no difficulty in this respect, in running these engines in any portion of the most crowded thoroughfares of the cities. But we apprehend there will be other embarrassments, in their use, in such places, which will prevent it for a considerable time to come. There is something, apparently, in the noiseless mode of the approach of these engines, which has thus far rendered them frightful to horses, — almost or quite as much so as the common locomotive steam-engine. And from the same cause we should apprehend they would be likely to produce accidents. Persons would, we fear, be constantly liable to injury before being made aware of their approach in the streets, when very much crowded.

From these considerations and some others, perhaps, we should be apprehensive it might be a considerable time before these engines would become of common use in the crowded streets in our cities. But these views and opinions are merely conjectural, and may not be justified by future experience.

(3.) They occupy but small space, and possess great power in ascending steep grades to the extent of three or four hundred feet in the mile. They will readily propel upon favorable grades, such as are required upon the steam roads, two or more passenger cars with from seventy-five to one hundred and fifty or more passengers, at the rate of from twelve to twenty miles an hour. We have intended to make all our statements in regard to the use and power

of these engines with caution, so as to be sure and not exceed the facts.

(4.) From all we saw and heard we came to the conclusion that the public mind was already prepared to afford these dummy engines a fair opportunity to prove their claims to public confidence. And it seems to us not improbable that, at no very remote day, these engines will be the most economical motive power in all the short and light passenger traffic upon steam railways, and will come into general use on street railways, unless it be in crowded thoroughfares.

12. In regard to "the systems of commutation tickets to be adopted," there was a good deal said and testified before us, and much conflict of opinion; and no mode has occurred to us whereby we could hope to reconcile these conflicting opinions. It is probable a good deal of this contrariety of opinion results from the fact that this matter of commutation tickets, or checks given upon one road to enable passengers to pass over the line of another company, will affect the different companies very differently. And no doubt much of it is attributable to the novelty of the experiment and the little opportunity which has thus far been given for settling the basis of a system upon the subject. The project which was enacted at the last session of your honorable body upon this subject, was a good deal complained of as being imperfect, unequal in some respects, and, above all, too complicated; and, as was urged by some, not clearly and readily understood by the conductors and subordinate employees of the different companies, thereby creating a good deal of uncertainty and perplexity to the companies and frequent disappointments and severe complaints from passengers. There probably is some foundation for these complaints. But we were satisfied there had not been a very earnest effort to make the thing work in the best possible manner, especially among those who were not expecting to be specially benefited by the system. We believe the present system might be made to operate well enough, and without any very considerable embarrassment to companies beyond what is always, more or less, incident to all changes in the mode of collecting fares, and especially changes rendering the system more complex. We think it specially desirable to keep the mode of collecting fares upon street passenger conveyances as simple as possible. We are not by any means confident that the system would not be

improved, both for the companies and the public, by a perfectly uniform fare, payable always in the same mode and with no commutation whatever, thus abolishing the use of tickets sold below the prices of single fares. This is believed to be the wisest system for street railways by many experienced persons. But it is one of those matters of detail which can best be regulated by the companies themselves, their own interest and that of the public being nearly identical, although operating in different directions, —the one desiring to reduce single fares, and the other to increase the general aggregate of traffic in such a manner as to increase the net profits.

It does not seem to us there is much demand for any system of commutation or exchange tickets upon street railways. The true theory is, in our judgment, to allow the lowest living compensation for a given distance, and then require the passengers to assume the loss resulting from special accommodation within the range of the route. This special accommodation is most frequently demanded, by way of subdivision of the trip. It would no doubt afford great accommodation to passengers if they could be allowed to subdivide the trip indefinitely. In a single trip within the limits of the city of Boston, without passing over the same track more than once, it might, no doubt, be convenient for some passengers to ride in ten different cars, in some extreme cases, and, in numerous cases, in three or four different cars. It is evident, therefore, that no system could be lived under which should allow the passenger to change cars at will, with no increase of fare. If there is to be, as it is evident there must be, some additional fare paid for each change of cars, there will always be some uncertainty in regard to the precise amount which should be required in order to compensate the expense. It will be very difficult to fix upon any general rule which shall be sure to afford full compensation short of requiring an additional fare for each change. And we think, as the change of cars is solely for the accommodation of the passengers, there should always be compensation for it, and that all doubts should be resolved against the party for whose benefit they are caused. It seems to us, therefore, both on the score of justice and simplicity, that if we were to take the matter entirely new we should leave it upon the basis of requiring an additional fare for every additional passage, unless and until the companies found it for their advantage, in order to give the public accommodation demanded in the most acceptable manner,

to devise some scheme of compromise in regard to checks for different lines, believing that it would be sure ultimately to be done in the best manner in that way. But since a statute has been enacted upon this subject with the apparent concurrence of those interested, we have felt reluctant to recommend its entire repeal until it has been fairly and fully tried, and we do not consider this has yet been done. If we were to recommend any modification of the existing provisions upon the subject, we should desire to substitute for them a general provision, that any passenger desiring to pass from any one point in any city or town to any other point in the same city or town, where the passage could not be effected in a single car, but might, by means of different cars, whether of the same or different companies, such persons should be allowed, by paying the highest fare required for a passage in any portion of such town or city, and one cent in addition for each check, to receive checks entitling him or her to the immediate completion of such continuous passage in any car running within the limits of such town or city, with the provision that, if such passenger should attempt to use such checks for any other purpose or at any other time, he or she should be liable to the same penalties as in other cases of evasion of lawful fare. This will be an accommodation beyond the actual compensation, but as the matter is hereby simplified very much, and as it could not be attended with serious loss to the company, and might increase the traffic to some extent, by affording greater accommodation, we should prefer this form of commutation to any other which has occurred to us, if we were to recommend any change. This mode is not liable to the same abuse as that now in force. We have inserted a section in the bill to this effect.

THE following opinion, which was first reported in 5 Am. Law Reg. 397, s. c. 24 Md. 84, affords a valuable commentary upon the duty of railway companies, who propel their cars along the streets of the large cities: —

The State of Maryland v. The Baltimore and Ohio Railroad Company.

The Baltimore and Ohio Railroad Company v. The State of Maryland.

Distinction between Passengers and Strangers. — Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers, than to mere strangers having no fiduciary relations with the company.

Distinction further defined.—In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

Negligence of Plaintiff.—The plaintiff cannot recover for an injury resulting from the negligence of the defendant, if notwithstanding such negligence, he might have avoided the injury by the exercise of care and prudence on his part, or if his own want of such care and prudence, or that of the party injured, in any way contributed directly to the injury.

Damages.—In a case where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.

The Baltimore and Ohio Railroad Company were the owners of a track on Locust Point, in the city of Baltimore, and used a locomotive for the regulation of the trains, picking up empty cars and uniting them to be sent out on the main track. On the occasion in question, a train had been formed in this manner, consisting of many cars, and was being backed at a very slow speed round a curve, on which were houses that prevented the engineman from seeing the back of the train or the end of the car. Two boys, playing in the neighborhood, who saw the train in motion, ran to get a ride on the last car, catching hold of the bumper, and with their feet on the brake car. A jolt threw one off, and he was killed, while the other was badly injured, losing a part of one hand. It was in proof that these boys had again and again been driven from the cars on other occasions, and their parents informed of their conduct. It was admitted that there was no employee of the company on the end car, and that the engineman and conductor did not know of the accident till some time after it happened.

OPINION.

BOWIE, C. J. These are cross-appeals in an action instituted, under the first and second sections of Article 65 of the Code, by the state for the use of a widowed mother, whose son was killed under the circumstances detailed in the bill of exceptions.

After evidence was offered by both parties, a series of prayers was submitted by each, all of which were rejected, and other instructions given by the court instead thereof.

To which rejection, and the instructions given, the plaintiffs and defendants severally excepted.

The counsel of the defendants having filed in these causes a declaration in writing, that, in the event of an affirmance of the judgment as against the plaintiffs on their appeal in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellants have been aggrieved by the action of the court below.

The General Assembly of this state, in the year 1852, finding the common-law maxim, "Personal actions die with the person," unsuited to the circumstances and condition of the people, enacted a law entitled "An act to compensate the families of persons killed by the wrongful act, neglect, or default of another person." To make its design more obvious, the fourth section provides, "the word person shall apply to bodies politic and corporate," and "all corporations shall be responsible, under this act, for the wrongful acts, neglect, or default of all agents employed by them."

The material provisions of this act, as well as its title, are derived from the 9th and 10th Victoria, and are embodied in Art. 65 (tit. Negligence) of the Code.

The object of the several series of prayers was : 1st. To furnish the jury with a standard of the care and diligence, required by law of the defendants, to exempt them from liability for damages for the injury incurred. 2d. To prescribe the care necessary to be exercised by the deceased to entitle his next of kin to recover. 3d. To define the measure of damages.

The appellants' first prayer required the defendants, under the circumstances therein predicated, "to exercise the *utmost care and diligence* to prevent accidents endangering the life or lives of the people or inhabitants of the said city."

The second held, that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard, or lookout, at the head or in the rear of said cars . . . was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

The appellants' third prayer affirms that the jury, in the estimate of damages, should take into consideration the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense, &c., and that, in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss provided in said case.

The propositions laid down by the court, in the first instructions, are : —

That the defendants, in the movement and management of their cars and engines, were bound to exercise the *utmost care and diligence* which it was within their means and power to employ, to prevent accidents, and injuring or endangering the life or lives of the people ; and if the jury find that the child of the plaintiff's *cestui que use* was run over and killed by the defendants' cars, as described by the witnesses, and that, if the defendants, in the use and management of their cars and engines, had exercised the *highest degree of care* and diligence " which it was within their means and power to employ," the said accident could have been prevented, then the plaintiff is entitled to recover in the action ; but although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care, by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of said boy's age and intelligence.

The degree of care and diligence imposed by law on the defendants, in the instruction given by the court, is as high as that required by the appellants' prayers ; the degree is the "*utmost care and diligence*," the " highest it was within their means and power to employ ; " the only material difference is, that one of the appellant's prayers asked the court to instruct the jury specifically, " that if the use of a guard or lookout, at the head, or in the rear of said cars, was a measure by which such accidents would probably be avoided, the omission was culpable negligence." The general terms used by the court embraced all the particulars specified by the prayer of the appellant qualified by the words, " it was within their means and power to employ."

The jury were at liberty to find, under the instruction given, and perhaps did find, that the absence of the guard constituted the want of the " highest care and diligence within the means and power of the defendants," and therefore rendered their verdict in favor of the plaintiff.

The liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound " to use the utmost care and diligence which human

foresight can use." *Stockton v. Frey*, 4 Gill, 406, 422, 423; *Worthington v. Baltimore and Ohio Railroad Co.* (in this court not yet reported). But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect, or default, "as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." *Vide* Code, art. 65, § 1.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law required towards those with whom there is a relation of trust and confidence, or bailment between the parties. "Towards the one, the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration. Towards the other, he is under no obligation but that of justice and humanity. While engaged in their lawful business both are bound to use a degree of caution suited to the exigencies of the case." 8 Barb. 378.

In an analogous case, this court said: Railroad companies should use "such care and diligence in using the locomotive upon the road, as would be exercised by skilful, prudent, and discreet persons, having the control and management of the engine, regarding their duty to the company, the demands of the public, and the interests of those having property, and having a proper desire to avoid injuring property along the road." This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons. Redfield on Railways, 345; 4 Md. 257.

The court's instruction did not close with the definition of the degree of care and diligence on the part of defendants, but proceeded to inform the jury, although the accident could have been prevented by the exercise of such care and diligence by the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of such care by the child as might, under all the circumstances, have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although, by the exercise of extraordinary care on their part the accident might have been prevented.

This ruling is in conformity with all the text-writers, and the great majority of adjudged cases. Redfield on Railways, § 179; 2 Car. & P. 730; 8 C. B. 115.

It is objected on the part of the plaintiff below, the appellant in this case, that the court's first instruction was erroneous, in instructing the jury, the action could not be maintained "if the jury believed the accident could have been avoided by the *exercise of that degree of care by the said child*, which was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence." Whereas the court should have told the jury the plaintiffs could not recover if the jury found "there was a want of that degree of care on the part of the said child which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of the "*want of*" or *absence* of such care, should have been left to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the court's instructions the proposition is stated affirmatively; in the appellant's objection it is negatively. The jury were to find whether there was or was not due care on the part of the deceased. They are told by the court, "if they believed the accident could have been avoided by the *exercise* of that degree of care," &c., the plaintiff could not recover. The appellant insists that not the exercise, but the want of care (which is the non-exercise of care), is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries to which his own negligence directly contributed, is admitted, and it seems to us it was clearly expressed by the court in the instruction given, as far as the conduct of the deceased child was concerned. In the case of *Baltimore and Ohio Railroad Co. v. Lamborn*, 12 Md. 257, 261, and *Keech's Case*, 17 id. 32, 46, the rule of the common law, that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to apply to actions brought on the statutes therein referred to, and the instructions affirmed by the court in those cases, submitted to the jury the question of negligence on the part of the plaintiff, as well as on the part of the defendant.

The same policy would require the plaintiff to show, in actions for injuries resulting in death, that neither the party injured, nor the parties for whose use the action was brought, had contributed,

by neglect or want of care, to the calamity complained of. This omission in the instruction given enured to the advantage of the appellant, and cannot be taken advantage of on her appeal.

The objection raised by the plaintiff to the court's second instruction involves the measure of damages. In the language of the brief, "it was erroneous, 1st. Because it ignores the mental sufferings of the mother suing for damages sustained by the loss of the child, and confines her claim to pecuniary damages." 2d. Because it limits the pecuniary loss of the mother, the *cestui que use*, "to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain in her advanced life for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation."

In the absence of any interpretation of this act by our own courts, we must compare and weigh the reasoning of the authorities cited, in which similar acts have been construed by other tribunals.

First in order are the decisions in England upon the act called Lord Campbell's Act, Redfield, § 179. The observations of *Cole-ridge*, J., in the case of *Blake, Adm'r, v. The Midland Railw.*, 10 Eng. L. & Eq. 437, cited by Redfield in his notes, are very strong in support of the instructions given by the court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says: "Our only safe course is to look at the language the legislature has employed. The title of the acts is for compensating families of persons, &c., not for solacing their wounded feelings." . . . By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death, to his family." This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion.

As we have before intimated, the title and language of the Act of Assembly of this state are most literally the same with those of the English statute.

The former contains, also, the provisions for distributing the damages among the surviving members of the deceased family, on

which the learned judge relies for adopting the principle of *compensation* for damages which may be estimated in money.

The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge *Redfield*, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

It is assumed by the learned author just mentioned, as the conclusion of the best-considered cases in this country, that mental anguish, which is the natural result of the injury, may be taken into the estimate of the damages to the party injured.

The connection in which this assumption is made, might lead to the inference that it applied to actions brought by *survivors* for injuries done to their deceased ancestor, relative, or next of kin; but upon reference to the authorities cited, it will be seen that the plaintiffs in those cases were the persons sustaining the bodily harm, and in estimating their damages their mental suffering constituted an element of compensation. 1 Cush. 451; 10 Barb. 623.

To have instructed the jury to allow "what they considered a reasonable compensation," would, in the language of the Supreme Court of Pennsylvania, "be giving the jury discretionary power, without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever." *Rose v. Story*, 1 Barr, 190, 197. In the case of the Pennsylvania Railroad Co. *v. Kelly*, 7 Casey, 372, the same learned court say:—

"Generally speaking, the influence of the court, in this class of cases, should be expected to restrain those excesses into which juries are apt to run. . . . Wild verdicts are frequently rendered. And the tendency, in modern times, undoubtedly is to excessive damages, especially where they are to be assessed against corporations." *Ibid.* 379; *The Pennsylvania Railroad Co. v. Rebe et ux.*, 33 Penn. St. 318, 330.

The last objection to the second instruction granted, is that it limits the mother to compensation for loss of her son during his minority only.

To submit to a jury the value of a life, without limit as to years, would have been to leave them to speculate upon its duration without any basis of calculation.

The law entitles the mother to the services of her child during

his minority only (the father being dead) ; beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. According to the appellant's theory, the mother and the son are supposed to live on together to an indefinite age ; the one craving for sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

This court, being of opinion that the several instructions granted by the court below were as favorable to the plaintiff (appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in the rulings of the court below, in the first appeal, and will affirm the judgment.

Judgment affirmed.

The first proposition maintained in this case is very obvious upon principle as well as the decided cases. Where such an amount of passenger traffic as is now done by railways is confided to agents operating by means of so powerful and dangerous an element as steam, no state or country could fairly justify any rule or responsibility except that of the utmost practicable watchfulness, skill, and ability. And no doubt these considerations, connected with the nature and extent of the business of railways, will justify a demand that their business shall be so conducted as to give fair and just opportunity for the conduct of other legitimate business, more or less interfering with that of the company, with reasonable security. The rule, as stated in some of the earlier cases, in regard to railways, is that they should be so conducted, with reference to other business interests, that all may have proper scope and reasonable opportunity to escape detriment ; the same as if the company owned both interests, and desired the success of both. *Quimby v. Vermont Central Railw. Co.*, 23 Vt. 387. This rule, as we have often attempted to show, will apply with great stringency to any business which is more than commonly liable to destroy life or property. Prudent men always measure their care and diligence by the exigencies of the business and the occasion. Hence it was held, in an early case in California (*Wilson v. Cunningham*, 3 Cal. 241), that where the track of a railway intersects the thoroughfares of a city the companies are bound to exercise extraordinary care not to injure persons in the streets.

Accordingly, in the present case, it is probably true, as suggested by the court, that where a company push a train of cars backwards through the streets of a city, they would be bound to have a servant so stationed that he could look out for persons or property exposed to injury, and who could either himself stop the train or give signal to some one for that purpose in time to prevent collision and damage. But this is not a question of law altogether, and would ordinarily have to be passed upon by the jury. We have discussed this general question of diligence and negligence, both as to the principles involved and the cases

bearing upon it, in *Taylor v. Briggs*, 28 Vt. 180, more in detail than would be proper here.

In regard to the effect of general negligence in the party to whom the injury occurs, remotely exposing him to the injury, but forming no part of the proximate cause of the same, the cases are numerous, and at the present day reasonably concurrent in the result, that unless the want of due care on the part of the party injured, or of those responsible for the conduct of such party, contributed directly to the production of the injury, the other party will be responsible, provided his negligence was the efficient cause of the injury, and, with the exercise of proper care, he might have avoided inflicting it, notwithstanding the general want of proper watchfulness by the party injured. The cases are too numerous upon this point to be quoted in detail. *Davies v. Mann*, 10 M. & W. 546; *Illidge v. Goodwin*, 5 C. & P. 190, are the leading English cases. The American cases will be found, in almost all the states, to have maintained the same view. *Trow v. Vermont Central Railw. Co.*, 24 Vt. 487; *Isbell v. N. Y. & N. H. Railw. Co.*, 27 Conn. 393; *Kerwbacker v. C. C. & C. Railw. Co.*, 3 Ohio N. S. 172; *C. C. & C. R. R. Co. v. Elliott*, 4 id. 474. The rule is very broadly stated in *New Haven Steamboat and Transportation Co. v. Vanderbilt*, 16 Conn. 421.

And it seems that the fact that the person or property, as cattle, are trespassing at the time the injury occurs, will not subject them to damage without redress, provided there is no such wrong on the part of the person, or of the owner of the property, as to contribute directly to the injury, so that the other party might not, with ordinary care, have avoided it. *Isbell v. N. Y. & N. H. Railw. Co.*, *supra*; *Daley v. Norwich & Worcester Railw. Co.*, 26 Conn. 591; *Brown v. Lynn*, 31 Penn. St. 510; *C. C. & C. Railw. Co. v. Terry*, 8 Ohio N. S. 570.

But where the negligence of the party injured, in any manner or to any extent, contributed directly to the production of the injury, however slightly, there can be no recovery. *Witherly v. Regent's Canal Co.*, 12 C. B. N. S. 2; s. c. 3 F. & F. 61. So in a very late English case, where the party finding the gates at a crossing negligently closed in the night-time, after every exertion to find some servant of the company to open them, necessarily opened the gates himself in order to pursue his journey, and where, without any fault on his part, the gate swung back by its own weight and struck the horse, which became unmanageable, whereby the plaintiff was thrown out of the carriage and injured, it was held he could not recover, inasmuch as he had no right to open the gates himself, and the injury was produced by his own wrongful act in doing so. *Wyatt v. Great Western Railw. Co.*, 11 Jur. N. S. 825.

The question of damages is one in regard to which, for a time, the cases seemed to vacillate somewhat upon the point whether the manner of the infliction of the injury and the shock to the feelings of those near relatives for whose benefit the action was brought, could be taken into the account. It seems very clear that where the suit is for the benefit of the very person sustaining the injury, there could be no question that any shock or injury to his feelings, any mental suffering, which was the direct consequence of the injury, should be considered in estimating damages. Such suffering is a part of the necessary burden to be borne by the party injured, in consequence of the injury. *Canning v.*

Williamstown, 1 Cush. 451; *Morse v. Auburn & Syr. Railw. Co.*, 10 Barb. 621. But in estimating damages to other parties, affected incidentally by the death of the party injured, it seems now pretty generally conceded, that no account of wounded feelings can be taken. And this, upon the whole, seems but just and reasonable. For there would be no uniformity in cases of this kind if the jury were allowed to go into considerations so remote and uncertain. *Penn. Railw. Co. v. McCloskey*, 23 Penn. St. 526. So in *North Penn. Railw. Co. v. Robinson*, 44 Penn. St. 175, it is said the value of the life lost, estimated by a pecuniary standard, is what is to be recovered.

There is one qualification in regard to the extent to which damages were allowed to be given by the jury in the principal case which has not generally been adverted to, and which seems to us somewhat liable to misconstruction. We refer to the restriction limiting prospective damages to the minority of the child. It has been decided that a father may recover pecuniary damages for the death of a son twenty-seven years of age, unmarried, and who has been accustomed to make occasional presents to his parents. *Dalton v. South Eastern Railw. Co.*, 4 C. B. N. S. 296. And it was here held, as it has often been in other cases, that the jury could not give damages by way of compensating the father for the expenses of his son's funeral or for procuring family mourning. So also *Franklin v. South Eastern Railway Co.*, 3 H. & N. 211; *Blake v. Midland Railw. Co.*, 18 Q. B. 93. It was lately held in the Exchequer Chamber (*Pym v. Great Northern Railw. Co.*, 10 Jur. N. S. 199), where, in consequence of the death of the father, his income was, by direction of his will, unequally distributed among his widow and children, the eldest son taking most of it, that damages might be recovered for the benefit of the whole class on that ground, some of the children being thereby deprived of an expected support, had the life of the father continued. In the late English case of *Boulter v. Webster*, 13 W. R. 289, the Court of Queen's Bench adhered to the rule that no damages could be awarded to the parent by reason of the death of his child, on account of the expenses of the funeral.

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